Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

COUNTY OF WESTCHESTER, NEW YORK,

Petitioner,

vs.

COMMISSIONER OF TRANSPORTATION OF THE STATE OF CONNECTICUT; TOWN OF GREENWICH; LAURELTON NURSING HOME, INC.; GREENWICH KING STREET ASSOCIATES II, L.P.; MILDRED TOMONTO; CONVENT OF THE SACRED HEART; LAURELTON CONVALESCENT HOME, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. May the court below deprive Westchester County, New York of its right, pursuant to 28 U.S.C. §1332, to have its claims against Connecticut residents (which affect the National Airport System plan adopted by the Federal Aviation Administration) determined in a neutral and impartial federal court, by giving effect to a Connecticut state court opinion rendered after certification of questions of law, where the state opinion expressly refused to answer the certified questions of law, but purported, instead, to decide the ultimate question of fact in a manner diametrically opposed to the finding of the United States District Court?

PARTIES

The names of all parties to the proceeding in the court whose judgment is sought to be reviewed appear in the caption of the case.

TABLE OF CONTENTS OF BRIEF

	Page
QUESTION PRESENTED	i
PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF CONTENTS OF APPENDIX	v
TABLE OF AUTHORITIES	vii
OPINIONS BELOW	2
JURISDICTION	5
STATUTES AND RULES INVOLVED	8
STATEMENT OF THE CASE	11
A. Background	11
B. Statement of Facts	15
C. Prior Proceedings	18
REASONS FOR GRANTING THE WRIT	24
CONCLUSION	45

TABLE OF CONTENTS OF APPENDIX

Page

Appendix A -

Decision of the United States Court of Appeals for the Second Circuit, Dated November 10, 1993 with Order and Mandate A-1

Appendix B -

Opinion and Order of the United States District Court for the Southern District of New York, Dated June 2, 1992 ..... A-28

Appendix C -

Order and Certificate of the United States Court of Appeals for the Second Circuit, Dated January 6, 1993 ..... A-158

Appendix D -

Opinion of the Connecticut Supreme Court, Dated July 28, 1993 ..... A-172

Appendix E -

Order of the United States Court of Appeals for the Second Circuit, Dated December 30, 1993 . A-194

TABLE OF AUTHORITIES

Cases	Page
Alexander & Alexander Services, Inc. v. Lloyd's Syndicate 317, 902 F.2d 165 (2d Cir. 1990)	30n.
Andrzejczyk v. Advo System, Inc., 146 Conn. 428, 151 A.2d 881 (1959)	18, 32
Bank of America National Trust and Savings Association v. Parnell, 352 U.S. 29, 77 S. Ct. 119 (1956)	43-44
Banque Worms v. Bankamerica Intern., 928 F.2d 538 (2d Cir. 1991)	30n.
Clearfield Trust Co. v. United States, 318 U.S. 363, 63 S. Ct. 573 (1943)	42
County of Westchester v. Town of Greenwich, 745 F. Supp. 951 (S.D.N.Y. 1990)	19n., 29
County of Westchester v. Town of Greenwich, 793 F. Supp. 1195 (S.D.N.Y. 1992)	2, 3, 18
County of Westchester, New York v. Commissioner of Transportation of the State of Connecticut, 986 F.2d 624 (2d Cir. 1993)	3, 20
County of Westchester, New York v. Town of Greenwich, 227 Conn. 495, 629 A.2d 1084 (1993)	3, 4
County of Westchester, New York v. Commissioner of Transportation of the State of Connecticut, 9 F. 3d 242 (2d Cir. 1993)	4
DeWeerth v. Baldinger, 836 F.2d 103 (2d Cir. 1987)	30n.

Cases	Page
Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817 (1938)	28, 42
Griggs v. County of Allegheny, Pa., 369 U.S. 84, 82 S. Ct. 531 (1962) *reh'g denied*, 369 U.S. 857 (1962)	35n., 37
Home Ins. Co. v. American Home Products Corp., 873 F.2d 520 (2d Cir. 1989)	30n.
Kidney by Kidney v. Kolmar, 808 F.2d 955 (2d Cir. 1986)	10, 30n.
Klar Krest Realty, Inc. v. Rajon Realty Corp., 190 Conn. 163, 459 A.2d 1021 (1983)	18, 32
Lehman Brothers v. Schein, 416 U.S. 386, 94 S.Ct. 1741 (1974)	19n.
Miree v. De Kalb County, Ga., 433 U.S. 25, 97 S. Ct. 2490 (1977)	42
Page Motor Co. v. Baker, 182 Conn. 484, 438 A.2d 739 (1980)	37n.
Peterson v. Oxford, 189 Conn. 740, 459 A.2d 100 (1983)	37n.
Town of Rye v. Skinner, 907 F.2d 23 (2d Cir. 1990) *cert. denied*, 498 U.S. 1024, 111 S.Ct. 673 (1991)	29n.
United States v. Causby, 328 U.S. 256, 66 S. Ct. 1062 (1946)	37
United States v. County of Westchester, 571 F. Supp. 786 (S.D.N.Y. 1983)	13

	Page
STATUTES	
United States Constitution, Article III, §2	27
28 U.S.C. §1332	8, 27, 36
28 U.S.C. §1291(b)	5, 18
28 U.S.C. §1254(1)	7
49 U.S.C. §§171-184	12
49 App. U.S.C. §1301(29)	26
49 U.S.C. §1302	12
49 U.S.C. §1303	12
49 App. U.S.C. § 1304	12, 26
Public Law 85-726	12
Public Law 91-255	12, 14
Connecticut General Statutes	
Section 15-34(8)	33
Section 15-73	33
Section 51-199a	8, 9
RULES AND REGULATIONS	
Rules of the Supreme Court of the United States, Rule §13.1	7
Rules of the United States Court of Appeals for the Second Circuit, Rule §0.27	9, 10
14 C.F.R. §77.25	14, 16
14 C.F.R. §139.101	14
PERIODICALS	
Hamilton, Alexander *Federalist Papers*, No. 80	27

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, the County of Westchester, New York, respectfully

petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, reversing the Opinion and Order of the United States District Court for the Southern District of New York granting petitioner a prescriptive avigation easement over lands in Connecticut belonging to the respondents.

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York, granting petitioner a prescriptive avigation easement over respondents' properties in Connecticut, reported as County of Westchester v. Town of Greenwich, Connecticut, Commissioner of Transportation of the State of Connecticut, Laurelton Nursing Home, Inc., Greenwich King Street Associates II, L.P., the Convent of the

Sacred Heart and Mildred Tomonto, appears in Appendix B hereto at A28, and is reported at 793 F.Supp. 1195 (S.D.N.Y. 1992).

The decision of the United States Court of Appeals for the Second Circuit certifying questions of law to the Connecticut Supreme Court appears in Appendix C hereto at A158, and is reported as County of Westchester, New York v. Commissioner of Transportation of the State of Connecticut, Town of Greenwich; Laurelton Nursing Home, Inc.; Greenwich King Street Associates II, L.P.; Mildred Tomonto; the Convent of the Sacred Heart, Laurel Convalescent Home, Inc. at 986 F.2d 624 (2d Cir. 1993).

The decision of the Connecticut Supreme Court, County of Westchester, New York v. Town of Greenwich at al., is

officially reported at 227 Conn. 495 (1993) and appears in Appendix D hereto at A172.

The Decision and Order of the United States Court of Appeals for the Second Circuit reversing the Order of the United States District Court for the Southern District of New York appears in Appendix A hereto at A1 and is reported at 9 F.3d 242 (2d Cir. 1993).

The Order of the United States Court of Appeals for the Second Circuit denying Westchester County's petition for rehearing with a suggestion for rehearing in banc, which is not reported, appears in Appendix E hereto at A194.

JURISDICTION

The decision and order of the United States District Court for the Southern District of New York was entered on June 3, 1992. Notices of Appeal from said Order were filed by the Town of Greenwich, Mildred Tomonto, Laurelton Nursing Home, Laurel Convalescent Home, Inc., Greenwich King Street Associates II, L.P. and the Convent of the Sacred Heart on June 29 and July 1 and July 2, 1992. On August 24, 1992, the United States District Court for the Southern District of New York amended its Order of June 2, 1992 to include a certification pursuant to 28 U.S.C. §1292(b) that an interlocutory appeal should be entertained. By an Order filed on January 6, 1993, the United States Court of Appeals for the Second Circuit ordered the Clerk of the Court

to transmit to the Connecticut Supreme Court a certification of three questions of law to be decided by that court. The Connecticut Supreme Court released its decision on July 28, 1993. On November 10, 1993, the United States Court of Appeals for the Second Circuit, based upon the Connecticut Supreme Court's decision, reversed the District Court's grant of partial summary judgment in favor of the County of Westchester and directed that court to enter judgment for the defendants and remanded for further proceedings on a separate cause of action. On November 24, 1993, the County of Westchester petitioned the United States Court of Appeals for the Second Circuit for rehearing with a suggestion for a rehearing in banc. By an Order filed on December 30, 1993, the United States Court of Appeals for the

Second Circuit denied the petition for rehearing.

In accordance with Rule 13.1 of this Court, this petition is filed within 90 days of the denial of the petition for rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES AND RULES INVOLVED

28 U.S.C. §1332

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum of value of $10,000, exclusive of interest and costs, and is between

(1) Citizens of different States;...

Connecticut General Statutes, Section 51-199a.

Uniform Certification of Questions of Law Act. (a) This section may be cited as the Uniform Certification of Questions of Law Act.

(b) The supreme court may answer questions of law certified to it by the Supreme Court of the United States, a court of appeals of the United States or a United States district court when

requested by the certifying court if there are involved in any proceedings before it questions of law of this state which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of the Supreme Court of this state. (P.A. 85-111).

Rule §0.27 of the United States Court of Appeals for the Second Circuit Certification of Questions of State Law

Where authorized by state law, the Court may certify to the highest Court of a State an unsettled and significant question of state law that will control the outcome of a case pending before this Court. Such certification may be made by this Court sua sponte or on motion of a party filed with the clerk of this Court. Certification will be in

accordance with the procedures provided by the state's legislature or highest state court rules, e.g., Conn. Public Act No. 85-111; New York Court of Appeals Rule 500.7. Certification may stay the proceedings in this court pending the state court's decision whether to accept the certification and its decision of the certified questions.

(Eff. Nov. 10, 1986.) See also Kidney by Kidney v. Kolmar, Laboratories, Inc., 808 F.2d 955 (2d Cir. 1987).

STATEMENT OF THE CASE

A. Background

The Federal Aviation Administration (FAA) substantially reduced the usable length of Runway 11/29 at the Westchester County Airport (Airport)* because trees on respondents' properties had grown to such height that they posed a potential hazard to planes attempting to land. Inasmuch as the airport is in New York, and the trees are in Connecticut, making condemnation proceedings unavailable, the County of Westchester (County) commenced an action in the United States District Court for the Southern District of New York to establish an avigation easement, (including a clearance easement), over the airspace needed by aircraft to land safely on Runway 11/29.

*The airport has only two runways.

Congress has taken an active interest in, and exercised a vital role in the development of the country's air transportation system since the enactment of the Air Commerce Act of 1926 (49 U.S.C. §§171-184). The Federal Aviation Act of 1958 (P.L. 85-726) declared that "the promotion of safety in air commerce and the promotion, encouragement and development of civil aviation" were in the public interest (49 U.S.C. §§1302, 1303) and that every citizen of the United States was entitled to freedom of transit through the navigable airspace of the United States (49 U.S.C. §1304).

Pursuant to the Airport and Airway Development Act of 1970 (P.L. 91-258), the FAA prepared a national airport system plan. The Westchester County Airport is included in the national

system and is an integral part of the New York City Metropolitan Area Airport System, accounting for approximately 15% of total operations in the metropolitan area (LaGuardia, JFK, Newark, Teterboro and Westchester). For a description of the National Airport System and Westchester County's part therein, see United States v. County of Westchester, 571 F.Supp. 786, 788-790 (S.D.N.Y. 1983) in which the United States District Court for the Southern District of New York found that a midnight to 7:00 a.m. curfew at the Westchester County Airport "has an adverse impact on the flow of interstate air commerce" and "also adversely affects the operation of the air transportation system in the New York metropolitan area." Id. 797. A fortiori, substantial shortening of one runway to 3100 feet, to say nothing of

its ultimate closure should the trees continue to grow unimpeded, will severely disrupt the operation of the air transportation system in the New York metropolitan area.

In furtherance of the development of a national transportation policy and the enhancement of air safety, Congress amended the Federal Aviation Act of 1958 (P.L. 91-258) to give the FAA power to certify airports and to make it unlawful to operate airports without a certificate. Among the many rules and regulations adopted pursuant to this authority, were those set forth in 14 C.F.R. (Code of Federal Regulations) §77.25 and §139.101 requiring that the approach surfaces at the end of runways be kept free of all obstructions and that buffer zones of empty airspace (clear zones) be maintained around landing glide slopes

-- those areas through which aircraft descend to reach the runway.

B. Facts

The Westchester County Airport was constructed by the United States of America* in 1942 for use in the war effort, and turned over to the County in 1945 at the end of World War II. The airport and Runway 11/29 (the obstruction of whose approach surfaces give rise to the present litigation) have been in continual and constant use for over fifty years. Runway 11/29 is sandwiched in between Rye Lake and Interstate Highway 684 on its western end and the Connecticut border on its eastern end.**

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* by the Civil Aeronautics Administration with the assistance of the Army Corps of Engineers.

**The eastern end of Runway 11/29 is barely 300 feet from the state line between New York and Connecticut.

Over the years, trees on respondents' properties grew to the point where they penetrated the airspace at the end of Runway 11/29 to such an extent that they posed a potential hazard to aircraft landing on that runway, causing the FAA, pursuant to its safety regulations (14 CFR §77.25) to displace the landing threshold of the runway by 1300 feet, reducing its usable length by approximately one third and rendering it unusable to all but very light aircraft.

When the United States government constructed the airport in 1942, it neglected to condemn any property in Connecticut or to negotiate any avigation or clearance easements over property lying beneath the flight paths used by aircraft landing on Runway 11/29 from the east. Once the airport was turned over to the County by the United

States, the opportunity for condemnation expired because a New York municipal corporation lacks authority to condemn property in Connecticut. Attempts by the County to negotiate easements for tree trimming with the Connecticut property owners has proved unavailing.*

Faced with the failure of the United States to acquire sufficient property at the time of construction to ensure future operations, and its own inability to institute condemnation proceedings, the County commenced an action, based upon diversity jurisdiction, in the United States District Court for the Southern District of New York to secure a prescriptive avigation easement over respondents' Connecticut properties,

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*Respondents have even refused permission to install safety devices, e.g. the Visual Approach Slope Indicator (VASI) on their property.

based upon its fifty-year use of such airspace that was "open, visible, continuous and uninterrupted for fifteen years and made under a claim of right" as required by the Connecticut law of prescriptive easements. Andrzejczyk v. Advo Systems, Inc., 146 Conn. 428, 431, 151 A.2d 881 (1959); Klar Krest Realty, Inc. v. Rajon Realty Corp., 190 Conn. 163, 168 459 A.2d 1021, 1024-5 (1983).

C. Prior Proceedings

In County of Westchester v. Town of Greenwich, 793 F.Supp. 1195 (S.D.N.Y. 1992) set forth in Appendix B at A28, the District Court (GOETTEL, J.), after a scrupulous examination of the facts and law, granted the County a prescriptive avigation easement over respondents' lands. Pursuant to 28 U.S.C. §1292(b), the United States Court of Appeals accepted respondents'

interlocutory appeals.

Thereafter, the Connecticut Attorney General in an Amicus Curiae brief requested, for the first time,* that the Court of Appeals certify questions of law pertaining to prescriptive avigation easements to the Connecticut Supreme Court.

The Court of Appeals, despite the parties' reluctance, certified the following three questions of law to the Connecticut Supreme Court:

1. Can an avigation easement be acquired by prescription in the

*The Connecticut Attorney General, as the attorney for the State Commissioner of Transportation, had been involved in the litigation since its inception in 1990. See County of Westchester v. Town of Greenwich, 745 F.Supp. 951 (S.D.N.Y. 1990). Cf. Chief Justice Rehnquist's comments with respect to tardy requests for Certification in Lehman Brothers v. Schein, 416 U.S. 386, 392-395, 94 S.Ct. 1741, 1745-47 (1974).

State of Connecticut?

2. If under Connecticut law a clearance easement is distinct from an avigation easement, can a clearance easement be acquired by prescription in the State of Connecticut?

3. Whether conceived as incident to an avigation easement or as constituting a separate clearance easement, would a clear zone include whatever airspace is necessary to use the easement?*

The Connecticut Supreme Court in its opinion County of Westchester, New York v. Town of Greenwich, 227 Conn. 495, 629 A.2d 1084 (1993) set forth in Appendix D at A172, explicitly refrained from answering any of the questions of law

*The Court of Appeals' Order and Certification are set forth in Appendix C at A158.

certified to it, and, instead, made the ultimate finding of fact that "under the circumstances of this case", the County had not acquired a prescriptive avigation easement.

The County moved the Court of Appeals to reject the Connecticut Supreme Court's opinion as unresponsive on the law and in excess of its jurisdiction on the facts, and for consideration of the appeal on the basis of the papers submitted and oral argument held on November 18, 1992.

The panel, in a two judge* Per Curiam decision dated November 10, 1993, (set forth in Appendix A at A1) denied the County's motion and reversed the District Court's Order, and remanded the

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*The Honorable Robert F.Peckham, Senior United States District Judge for the Northern District of California, sitting as a member of the panel by designation, died on February 16, 1993.

case for further proceedings based upon the Connecticut Supreme Court's opinion on the facts.

The County thereafter petitioned the Court of Appeals for a rehearing with a suggestion for a rehearing in banc on the grounds that the certification of questions of law to the state court was erroneous and not in conformity with the Court of Appeals' own practice; that the state court opinion was inconsistent, unresponsive on the law and in excess of its jurisdiction on the facts; and that the Court of Appeals by allowing the state court to make the ultimate finding of fact, deprived the County of Westchester of its right to avail itself of the diversity jurisdiction of the federal court for a fair and impartial determination of its claims against Connecticut residents.

This petition was denied on December 30, 1993. A Copy of the Court of Appeals Order is set forth in Appendix E at A194.

REASONS FOR GRANTING THE WRIT

Trees growing in Connecticut in proximity to the end of Runway 11/29 at the Westchester County Airport have obstructed the airspace needed to insure safety in landing on Runway 11/29 to such an extent that the Federal Aviation Administration has displaced the landing threshold, thereby drastically shortening the usable length of the runway. If these trees are not trimmed, but are allowed to grow without interruption, operations at the Westchester County Airport will be severely curtailed which, in turn, will affect the national air transportation system for the New York Metropolitan Region.

The United States government, which built the airport in 1942, did not condemn land in Connecticut to enable it, as the owner and operator of the

airport, to trim the trees as necessary. Westchester County which took over the airport from the United States at the end of World War II, is, as a matter of law, unable to condemn property in Connecticut. In order to keep Runway 11/29 open and the airport operating as an integral part of the national airport system plan, Westchester County commenced an action in federal court to impose a prescriptive avigation easement over the airspace in Connecticut needed to allow aircraft to land safely. The choice of federal court was deliberate. Not only did Westchester County seek an impartial tribunal for the resolution of its own claims, but it also sought a forum sensitive to the Congress' interest in the national air transport system.

The case raises questions of whether

out-of-state litigants espousing locally unpopular views can expect to receive a fair and impartial hearing in the federal courts, or whether they will be forced to have their claims determined in a less than receptive state court environment -- whether an unresponsive state court opinion will be allowed to subvert national aviation policy and imperil the right of all citizens to freedom of transit through the navigable airspace of the United States (49 U.S.C. §1304), including "airspace needed to insure safety in take-off and landing of aircraft" (49 U.S.C. §1301 (29)).

The Second Circuit Court of Appeals' decision in this case deprives Westchester County, New York and its citizens, of an essential right, recognized by the drafters of the Constitution and provided by Congress --

the right to have their claims decided by a fair and impartial tribunal.

As Alexander Hamilton so eloquently expressed in the Federalist Papers, No. 80:

> "No man ought certainly to be a judge in his own cause, or in any cause in respect to which he has the least interest or bias. This principle has no inconsiderable weight in designating the federal courts as the proper tribunals for the determination of controversies between different States and their citizens."

Pursuant to this fundamental and quintessential principle of fair play, the Constitution of the United States, Article III, §2 provides that the judicial process of the United States extends to controversies between citizens of different states, and Congress has declared that:

> The district courts shall have original jurisdiction of all civil actions...between (1) Citizens of different States...". 28 U.S.C. §1332.

As this Court recognized in Erie R. Co. v. Tompkins, 304 U.S. 64, 67, 58 S.Ct. 817, 820 (1938), diversity jurisdiction was conferred on the federal courts not only to combat actual discrimination but "to prevent apprehended discrimination in state courts against those not citizens of the state." Notwithstanding periodic suggestions that it be eliminated, it has remained a cornerstone of federal jurisdiction because of the perception that even in these modern, sophisticated times, citizens of one state may not be able to obtain an impartial or unbiased hearing in the courts of another state. This is especially true in cases like the one at bar where the litigant, or the subject of the litigation, is one that arouses strong local passions.

Airports, despite efforts at noise abatement, are generally not beloved by those who live in proximity to them. As the District Court below found, County of Westchester v. Town of Greenwich, 745 F.Supp. 951, 953 (S.D.N.Y. 1990):

> "The property owner defendants claim they are not, and never have been, interested in having any airplanes flying overhead, and are taking advantage of the fact that the ball is in their court now that the trees have reached an intrusive level."*

It is for just such reasons that Westchester County exercised its right to invoke the jurisdiction of the federal court system.

The Court below has denied Westchester County its right to a fair and impartial forum for the resolution

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*See also Town of Rye v. Skinner, 907 F.2d 23 (2d Cir. 1990) cert. denied, 498 U.S. 1024, 111 S.Ct. 673 (1991) in which the Town of Greenwich among others, sought to prevent the modernization of the Westchester County Airport.

of its claims, not by certifying questions of law to the Supreme Court of Connecticut (although certification in this case, which presented an issue never likely to arise again, was contrary to the Court's usual practice*) but by giving effect to the opinion of the Connecticut Supreme Court which refused to answer any of the questions of law certified to it while at the same time purporting to decide the ultimate question of fact. The Connecticut Court

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*The questions certified should be confined to issues likely to recur with some frequency, which will have a significant impact on state law or involve the application of important public policy. Kidney by Kidney v. Kolmar, 808 F.2d 955 (2d Cir. 1987); DeWeerth v. Baldinger, 836 F.2d 103 (2d Cir. 1987); Home Ins. Co. v. American Home Products Corp., 873 F.2d 520 (2d Cir. 1989); Alexander & Alexander Services, Inc. v. Lloyd's Syndicate 317, 902 F.2d 165 (2d Cir. 1990); Banque Worms v. Bankamerica Intern., 928 F.2d 538 (2d Cir. 1991).

refused to either rule that it was impossible to acquire an avigation easement by prescription in Connecticut, or divulge what steps were necessary to acquire such an easement prescriptively. Instead, it stated that since Westchester County was not entitled to a prescriptive avigation easement, it was unnecessary to answer the certified questions of law.

By allowing the Connecticut court to decide the ultimate question of fact, the Court of Appeals for the Second Circuit abolished diversity jurisdiction in this case and left Westchester County to the mercy of the Connecticut Court in its dispute with Connecticut residents.

The basic question of law certified by the Court below to the Connecticut Supreme Court was "Can an avigation easement be acquired by prescription in the State of Connecticut?". The

Connecticut law of prescriptive easements is firmly established. A successful claimant must show that its use was "open, visible, continuous and uninterrupted for fifteen years and made under a claim of right." Andrzejczyk v. Advo Systems, Inc., 146 Conn. 428, 151 A.2d 881 (1959); Klar Krest Realty, Inc. v. Rajon Realty Corp., 190 Conn. 163, 459 A.2d 1021 (1983). The District Court found as a fact that Westchester County's use of Runway 11/29 was open and visible (App. infra, at A82), adverse (App. infra, at A84-86), made under a claim of right (App. infra, at A86-7) and continuous and uninterrupted for a period of fifteen years (App. infra, at A109-10), and therefore, satisfied all of the Connecticut requirements for a prescription easement. However, because

there was no Connecticut case law* with respect to prescriptive avigation easements, the Court below certified questions of law to the Connecticut Supreme Court to discover whether Connecticut required more (and if so, what requirements) than usage which was open, visible, adverse, continuous and uninterrupted for fifteen years and made under a claim of right to acquire a prescriptive avigation easement.

At the very outset of its opinion, the Connecticut Supreme Court misstated the certified question of law presented to it by declaring: "The dispositive question is whether the plaintiff ... has acquired on ... avigation easement

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*Connecticut statutes explicitly recognize avigation easements. Connecticut General Statutes, Section 15-73 and Section 15-34(8), and Section 15-41-31(d) of the Regulations of Connecticut State Agencies.

by prescription ..." (App. infra, at A175).

The Connecticut Supreme Court concluded that the County "did not acquire a prescriptive avigation easement in the circumstances presented"* (emphasis supplied) and declined to decide "whether an avigation easement may ever be acquired by prescription." Clearly, this decision does nothing to clarify the Connecticut law of prescriptive avigation easements, and strongly implies that prescriptive avigation easements may be acquired in other unspecified circumstances.

The Connecticut court usurped the

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*The Connecticut court repeatedly dwelt on the facts, rather then the law, e.g. "in the circumstance of this case" App. infra, at A177, "in the circumstances presented" App. infra, at A187, "in these circumstances" App. infra, at A189, "not in these circumstances" App. infra, at A193.

authority of the federal district court to make findings of fact, and made several which in effect "reversed" the findings of the district court.* The Court of Appeals by its certification sought to discover whether Connecticut law recognizes prescriptive avigation easements, and what legal requirements are necessary to obtain them. With this information, the federal court is supposed to make its own findings of fact and apply them to Connecticut law.

The Court of Appeals for the Second Circuit by reversing the District

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*E.g., the Connecticut court found that the overflights had not interfered with the landowners' use and enjoyment of their properties (App. infra, at A191), whereas the District Court found that the overflights came within 31 feet and 17 feet respectively of Tomonto's and Greenwich King Street's properties (App. infra, at A84-85), well within the limits set by this Court for such interference in Griggs v. County of Allegheny, Pa., 369 U.S. 84, 82 S.Ct. 531 (1962) reh'g denied,369 U.S.857 (1962). Furthermore,

Court's decision based upon the Connecticut court's finding of fact, has deprived petitioner of its right pursuant to 28 U.S.C. §1332 to have the ultimate findings of fact made by a neutral tribunal.

While refusing to explain or describe the steps necessary to acquire a prescriptive avigation easement, the Connecticut court implied rather strongly that its finding of fact, negating the County's acquisition of a prescriptive avigation easement, was based upon the inability of the Connecticut landowners to enjoin aircraft from landing at the Westchester County Airport.*

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the County's use of the clear zones as safety buffers was incompatible with respondents' desires to grow trees to their mature height (App. infra, at A86).

*Heretofore, the Connecticut Supreme Court has taken a somewhat less rigid view of property rights, holding that

Since flights through the navigable airspace of the United States may not be enjoined, United States v. Causby, 328 U.S. 256, 66 S.Ct. 1062(1944); Griggs v. County of Allegheny, Pa., 269 U.S. 84, 82 S.Ct. 531 (1962) reh'g denied, 369 U.S. 857 (1962), it is difficult to imagine under what other circumstances the Connecticut court might ever recognize a prescriptive avigation easement.

Petitioner is not asking this Court, or the Court below to "correct" the Connecticut Supreme Court's

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they must be exercised with reference to the rights of others.
"Current social policy dictates that a person no longer have unfettered control of his land. In an urbanized state such as Connecticut it would be unjust for [an easement owner] to ignore the harmful consequences of his actions." Page Motor Co. v. Baker, 182 Conn. 484, 438 A.2d 739 (1980) cited with approval in Peterson v. Oxford, 189 Conn. 740, 746, 459 A.2d 100, 103 (1983).

interpretation of Connecticut law. The Connecticut Court never clarified, interpreted or declared the Connecticut law of prescriptive avigation easements.

Petitioner maintains that since the Connecticut Supreme Court refused to answer the questions of law certified to it, and refused to clarify the Connecticut law of prescriptive avigation easements, the Court below erred in applying the Connecticut opinion* and also erred in reversing the District Court based upon the Connecticut court's

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*The Court below chided petitioner for failing to cite any authority (App. infra, at A20) to support rejecting the Connecticut opinion. However, this appears to be a case of first impression. The entire purpose behind certifying questions of law is to clarify the law of the other jurisdiction. There is no statutory or case law which requires a court to accept an unresponsive opinion.

findings of fact.*

Furthermore, the Court below in commenting (App. infra, at A21) that Connecticut appeared to have added an adverse use requirement to its prerequisites for acquiring prescriptive avigation easements, failed to take into consideration that the District Court specifically included this element in its analysis, and specifically found that the County's use was adverse (App. infra, at A84-86). These errors deprived petitioner of its right to have its claims against Connecticut residents decided by an impartial federal tribunal, rather than to have such claims compromised by a

*In an attempt to justify its reliance on the Connecticut opinion, the Court below rationalized that while the Connecticut opinion refused to answer any of the questions of law certified to it, it had answered a "subset" of the

myopic and parochial state court decision.

The Connecticut Supreme Court's fact specific decision, coupled with its refusal to answer any of the certified questions of law, does not constitute a controlling statement of state law which must be applied by the Court of Appeals for the Second Circuit. Rather, it is a result oriented decision designed to defeat the County's claim while conveniently leaving the general question of law unanswered for a more sympathetic claimant.

The fact that the Connecticut Court

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certified questions of law i.e. "whether an avigation easement can be acquired ... in these circumstances" (App. infra, at A20). The question the Connecticut court posed to itself, in lieu of those certified to it, was a question of fact, not law. It is axiomatic that a question of fact cannot be a "subset" of a question of law.

made no genuine effort to answer the questions of law certified to it while denying the County its easement as a matter of fact, is a striking example of why the need for diversity jurisdiction remains as strong today as it appeared to the drafters of the Constitution over two hundred years ago.

The mischief caused by allowing narrow state interests to decide Westchester County's claim against Connecticut residents goes far beyond economic harm to the County. It seriously affects national interests and impedes the right of the public to freedom of transit through the navigable airspace of the United States, 49 App. U.S.C. §1304, which includes airspace needed to land safely. 49 App. U.S.C. §1301(29). The FAA has expressed its concern in this area.

The Westchester County Airport is an integral part of the New York City Metropolitan Air Transportation System. Actions which reduce its effectiveness also diminish the effectiveness of the system as a whole. While state law normally prevails in the private aspects of diversity jurisdiction cases between private parties, Erie R. Co. v. Tompkins, op cit, supra p. 28, nevertheless, where there are broad issues going beyond the narrow interests of the parties, and where federal rights are implicated, the federal courts have applied federal common law. Clearfield Trust Co. v. United States, 318 U.S. 363, 63 S. Ct. 573 (1943). The present case, unlike Miree v. DeKalb County, Ga., 433 U.S. 25, 97 S. Ct. 2490 (1977) strikes at the heart of the national transportation system by allowing a state court (which

has no jurisdiction to make findings of ultimate fact on a certified question of law referral) to determine the fate* of the national air transportation system in this area.

Petitioner is not suggesting at this point, that this Court impose a federal law of prescriptive avigation easements, but it does urge that this Court, at the very least, not disrupt the air transport system by tolerating the application of some purported state requirement, which the state court itself refused to enunciate, even though explicitly invited to do so.

This Court has granted certiorari before when important issues of federal-state relations were raised.

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*Unless the obstructing trees are trimmed, their continued growth will ultimately lead to the closure of Runway 11/29, or to such drastic shortening as will render it useless.

Bank of America National Trust and Savings Association v. Parnell, 352 U.S. 29, 77 S. Ct. 119 (1956), and petitioner urges that it do so again, to vindicate petitioner's right to have its claims adjudicated by an impartial tribunal and to protect the national air transportation system from unwarranted state interference.

CONCLUSION

For these reasons, a writ of certiorari should be issued to review the Decision and Order of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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March 30, 1994

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 554, 555, 556, 557, 558 August Term 1992
Argued: November 18, 1992
Decided: November 10, 1993
Certification to Connecticut Supreme Court: January 6, 1993

Submitted on supplemental briefs after response of Connecticut Supreme Court: August 27, 1993

Docket Nos. 92-7698, -7700, -7704, -7706, -7726

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COUNTY OF WESTCHESTER, NEW YORK,
Plaintiff-Appellee,
- against -
COMMISSIONER OF TRANSPORTATION OF THE STATE OF CONNECTICUT,
Defendant,
TOWN OF GREENWICH; LAURELTON NURSING HOME, INCORPORATED; GREENWICH KING STREET ASSOCIATES II, L.P.; MILDRED TOMONTO, CONVENT OF THE SACRED HEART,
Defendants-Appellants,
LAUREL CONVALESCENT HOME, INC.,
Appellant.

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Before: FEINBERG and KEARSE, Circuit Judges.[1]

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[1]The Honorable Robert F. Peckham, Senior United States District Judge for the Northern District of California, who was sitting by designation at the time of oral argument, passed away on February 16, 1993.

Interlocutory appeal pursuant to 28 U.S.C. § 1292(b) from order of United States District Court for the Southern District of New York, Gerard L. Goettel, J., granting plaintiff County of Westchester partial summary judgment on claim of prescriptive avigation easement under Connecticut law against Connecticut landowners.

Reversed and remanded.

KARL S. COPLAN, New York, NY (Berle, Kass & Case, Eve C. Gartner, of Counsel); Kelley Drye & Warren, John M. Callagy, of Counsel); Cadwalader Wickersham & Taft, William Schwartz, of Counsel); Attorneys for Defendant-Appellant the Convent of the Sacred Heart.

JOYCE H. YOUNG, Greenwich, CT (John E. Meerbergen, Greenwich Town Attorney, of Counsel), Attorneys for Defendant-Appellant Town of Greenwich.

The County of Westchester has filed a motion seeking to reconstitute the panel with a third judge, arguing that "additional delay, in the event of the inability of a two judge panel to reach a decision, is unnecessary and should be avoided." However, the remaining

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Cummings & Lockwood, Stamford, CT (Chase Rogers, Rosalind Kelley, of Counsel), for Defendant-Appellant Greenwich King Street Associates II, L.P.

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Richard Blumenthal, Hartford, CT, Attorney General, State of Connecticut, Cornelius F. Tuohy, Assistant Attorney General, for State of Connecticut, Amicus Curiae.

Leonard A. Ceruzzi, Janet V. Lanigan, J.E. Murdock, III, Baker, Worthington, Crossley, Stansberry & Woolf, Washington, DC, for National

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members of the panel agree on the disposition of this appeal, and the local rules of this Circuit permit us to issue an opinion without replacing Judge Peckham. Local Rule § 0.14(b). Therefore we deny the County's motion to reconstitute the panel.

Business Aircraft Association and the Westchester Aviation Association, Amici Curiae.

John S. Yodice, Ronald D. Golden, Raymond C. Speciale, Yodice Associates, Washington, DC, for Aircraft Owners and Pilots Association, Amicus Curiae.

William E. Hegarty, Greenwich CT, John B. Conway, New York, NY, for themselves as Amici Curiae.

PER CURIAM:

Defendants, landowners in the State of Connecticut (landowners), appeal from an order entered in June 1992 in the United States District Court for the Southern District of New York, Gerard L. Goettel, J., granting partial summary judgment to plaintiff County of Westchester (the County) on its claim of a prescriptive avigation easement under Connecticut law. 793 F. Supp. 1195. The appeal comes to us pursuant to 28 U.S.C. § 1292(b), the district court having made the requisite certification

in August 1992 and this court having accepted the interlocutory appeal. We heard argument in November 1992, and in January 1993 we certified certain questions of state law to the Connecticut Supreme Court. 986 F.2d 624. Based on the response from that Court, we reverse the district court's order and remand for consideration of the remaining claims.

Background

A. The Litigation in the District Court

The facts of the case are discussed in great detail in the district court's published opinions, familiarity with which will be assumed. See 745 F. Supp. 951; 756 F. Supp. 154; 793 F. Supp. 1195. We will discuss the facts only briefly here.

The Westchester County Airport (the airport), owned and operated by the

County, is located in New York State adjacent to the Connecticut border and has been in operation for more than 40 years. 745 F. Supp. at 953. The approach zone to runway 11/29, one of the airport's two runways, is located almost entirely in Connecticut. The tree-studded path underneath the approach zone is owned by defendant landowners. One of the landowners, the Town of Greenwich, is a public entity. The rest are private persons or entities.

In 1981, the Federal Aviation Administration (FAA) warned the County that several of the landowners' trees had penetrated the airspace constituting the mandatory "clear zone" for runway 11/29. The clear zone, as distinguished from the flight path, is not airspace through which the airplanes regularly fly, but rather is "a ground level area

beyond the runway to be kept clear of vertical structures that could interfere with low-flying aircraft." United States v. City of New Haven, 367 F. Supp. 1338, 1339 n.2 (D. Conn. 1973), aff'd, 496 F.2d 452 (2d Cir.), cert. denied, 419 U.S. 958 (1974). Because of concern over the problems posed by the trees, the FAA in February 1989 ordered the runway's usable length shortened by approximately 1300 feet. The effect of this order was to stop the use of the runway for many types of airplanes. 745 F. Supp. at 953. The County offered to trim the trees back at its own expense, but the landowners refused. Id.

In February 1990, the County filed this action in the district court seeking, among other things, to force the landowners to have the trees trimmed. The parties agreed that "New

York cannot exercise its powers of eminent domain over property located in another state." Id. The parties further agreed that Connecticut law controls under the New York choice of law rule favoring the law of the situs of the real property at issue. Id. at 957 n.7. In its complaint, the County advanced several theories based on federal law and Connecticut state law. In September 1990, the district court granted in part the landowners' motion to dismiss for failure to state a cause of action under F.R.Civ.P. 12(b)(6), and granted the motion of an additional defendant, the Commissioner of the Connecticut Department of Transportation, to dismiss the complaint against him in its entirety. Id. at 954-57. As a result of these dispositions, the County's only

remaining claims were state common law claims including a claim of a prescriptive avigation easement. Id. at 962.

The district court addressed the prescriptive avigation easement claim in the opinion that culminated in the June 1992 order now before us. 793 F. Supp. 1195. The district court noted that the County in effect seeks two separate easements: an "avigation or flight easement giving it right to fly through the airspace above defendant's properties [and] a clearance easement providing it the right to cut down those trees obstructing the approach to runway 11/29 and its clear zones." Id. at 1204; see also United States V. Brondum, 272 F.2d 642, 644-45 (5th Cir. 1959) (distinguishing between avigation easements and clearance easements). In

its opinion, the district court noted the uncertain status of both types of easements under Connecticut law. Nonetheless, the court concluded that "recognition of a prescriptive avigation easement is the proper course." 793 F. Supp. at 1205.

The district court applied the general requirements for acquiring prescriptive easements under Connecticut law and granted the County's motion for summary judgment on the prescriptive avigation easement claim. Id. at 1213. Noting that "[u]nder Connecticut law, the 'owner of an easement has all rights incident or necessary to its proper enjoyment,'" id. (quoting Kuras v. Kope, 205 Conn. 332, 341 (1987)), the district court further concluded that "[b]y virtue of its acquisition of an avigation easement, the County also

obtained... a right to unobstructed clear zones." Id. With respect to the dimensions of the easements, the district court assumed that "while not generally bound to enforce the FAA clear zones or to defer to the FAA's institutional expertise in the area of air safety, Connecticut would agree that the clear zones necessary for safe air operations are those identified in the FAA regulations." Id. at 1217.

The district court then granted the landowners a partial offset based on counter-easements they had acquired by virtue of the encroachment of their trees into the clear zone since approximately 1975, id. at 1219, and the court appointed special master to evaluate which trees should be trimmed and removed. Id. at 1222.

B. Certification To The Connecticut Supreme Court

In its § 1292(b) certification to us, the district court formulated the controlling question of law as: "whether the state of Connecticut recognizes avigation easements acquired by prescription and, if so, whether it would include a clearance easement and what its dimensions would be." Noting the absence of controlling precedent in Connecticut on the issues presented and the potential effect a decision might have on the property rights of Connecticut residents, we agreed with the suggestion of amicus Attorney General of the State of Connecticut that the questions of state law referred to above should in turn be certified to the Connecticut Supreme Court. Certification to that court respects Connecticut's strong interest in deciding those questions "rather than

having the only precedent on point be that of the federal court, which may be mistaken." Home Ins. Co. v. American Home Prods. Corp., 873 F.2d 520, 522 (2d Cir. 1989).

By order dated January 6, 1993, we certified the following questions of law to the Connecticut Supreme Court:

1. Can an avigation easement be acquired by prescription in the State of Connecticut?

2. If under Connecticut law a clearance easement is distinct from an avigation easement, can a clearance easement be acquired by prescription in the State of Connecticut?

3. Whether conceived as incident to an avigation easement or as constituting a separate clearance easement, would a clear zone include whatever air space is necessary to use

the easement? See 986 F.2d at 627.

The Connecticut Supreme Court accepted certification, and heard oral argument in April 1993. In a decision released July 28, 1993, the Connecticut Supreme Court responded to the certification. 227 Conn. 495 (1993).

Discussion

A. The decision of the Connecticut Supreme Court

We receive the Connecticut Supreme Court's response to our certification bearing in mind that the highest court of state "has the final word on the meaning of state law." Deeper Life Christian Fellowship, Inc. v. Sobol, 948 F.2d 79, 84 (2d Cir. 1991). Thus, we are obligated to apply Connecticut law as determined by the Connecticut Supreme Court. Cf. Home Ins. Co. v. American Home Products Corp., 902 F.2d 1111, 1113 (2d Cir. 1990).

The Connecticut Supreme Court acknowledged, as had the district court, that "the issue of whether an avigation easement may be acquired by prescription is one of first impression in [Connecticut]." 227 Conn. at 501-02. However, the Court declined to answer that question, stating that: "Because we conclude that the plaintiff did not acquire a prescriptive avigation easement in the circumstances presented, we need not decide whether an avigation easement may ever be acquired by prescription in this state." Id. at 502.

First, the Connecticut Supreme Court made clear that "[p]prescriptive easements are recognized in [Connecticut]." Id. at 501 (citing Connecticut General Statutes § 47-37; Klar Crest Realty, Inc. v. Rajon Realty Corp., 190 Conn. 163 (1983)). The Court

then enumerated the conditions for obtaining a prescriptive easement emphasizing that, under Connecticut law, "'[t]o establish an easement by prescription it is absolutely essential that the use be adverse. It must be such as to give a right of action in favor of the party against whom it has been exercised.'" Id. (citing Whiting v. Gaylord, 66 Conn. 337, 344 (1895)). In addition, "the party claiming to have acquired an easement by prescription must demonstrate that the use of the property has been 'open, visible, continuous and uninterrupted for fifteen years and made under a claim of right.'" Id. (citations omitted). The Court further noted that "Connecticut law refrains from extinguishing or impairing property rights by prescription unless the party claiming

to have acquired an easement by prescription has met each of these stringent conditions." Id.

The Connecticut Supreme Court decided that the County could not have obtained a prescriptive avigation easement "in these circumstances" as a matter of law because the County's use of the flight and clearance zones was not adverse. The Court held that the landowners "had no right of action against the plaintiff to stop the overflights because federal law prohibits landowners from obtaining injunctive relief against aircraft using the navigable airspace of the United States." Id. at 502-03 (citing City of New Haven, 367 F. Supp. at 1341; Town of East Haven v. Eastern Airlines, Inc., 331 F. Supp. 16 (D. Conn. 1971), aff'd, 470 F.2d 148 (2d Cir. 1972), cert.

denied, 411 U.S. 965 (1973)). The Court noted that federal authorization provides additional grounds for finding that the County's use was not adverse. Id. at 503 n.12. The Court concluded that "[i]n these circumstances, the defendants could not have reclaimed the exclusive use of the airspace above their properties and, therefore, the use of that airspace by the plaintiff can not be considered adverse." Id. at 503.

The Connecticut Supreme Court also considered the argument that the County's use was adverse because of defendants' right to bring a takings claim pursuant to the Fifth and Fourteenth Amendments to the United States Constitution under the theory of United States v. Causby, 328 U.S. 256, 266 (1946) (recognizing a compensable taking for flights "so low and so

frequent as to be a direct and immediate interference with the enjoyment and use of the land") and Griggs v. Allegheny, 369 U.S. 84, 88-89 (1962). The Connecticut Court rejected this argument too. The Court noted: "Although we doubt that we would ever require a landowner to assert a constitutional takings claim in order to avoid the acquisition of a prescriptive avigation easement, we are satisfied that these defendants were not obliged to do so." Id. Thus, the Connecticut Supreme Court held that, under Connecticut law, the County could not have obtained a prescriptive avigation easement.

B. The County's challenges

Upon receipt of the response of the Connecticut Supreme Court to our certification, we asked the parties for supplemental briefs addressed to that

response. Not surprisingly, the County has asked us to reject the decision of the Connecticut Court. The County argues that the Court did not respond to the questions certified and that the Court improperly based its decision on independent findings of fact. Putting to one side the question whether we could reject the Connecticut Court's response -- the County cites no case where that has occurred -- we see no persuasive reason why we should do so. It is true that the Court did not answer precisely the first question we certified, i.e., the general question of whether an avigation easement can be acquired by prescription under Connecticut law. Nonetheless, the Court did answer a material subset of that question, i.e., whether an avigation easement can be acquired under Connecticut law in these

circumstances. We believe that the Connecticut Supreme Court's decision is dispositive, both as responsive to our certification and also, under Erie R.R. v. Tompkins, 304 U.S. 64 (1938), as a controlling statement of state law regarding a common law claim.

The County asserts that "the Connecticut Supreme Court has disregarded the mandate of this Court, and usurped the jurisdiction of this Court by presuming to decide an ultimate question of fact which is the sole prerogative of this Court." We think the County mischaracterizes the Connecticut Supreme Court's opinion. To the contrary, the Court applied Connecticut's adverse use requirement to the record supplied by the district court and determined that the County could not, as a matter of Connecticut

law, have acquired a prescriptive avigation easement.

It is true that to the extent that the Connecticut Supreme Court's opinion was based on federal law we would not be bound by it. It is also true that the Connecticut Court's ruling that the landowners could not obtain injunctive relief against the overflights was based upon federal law. But, the County agrees with that assertion. What the County disagrees with is the view of the Connecticut Court that since the landowners "could not have reclaimed the exclusive use of the airspace above their properties . . . the use of that airspace by the [County] can not be considered adverse." 227 Conn. at 503. The County argues vigorously that this proposition is incorrect. But, the proposition, whether or not one endorses

it, is a statement of Connecticut law that we are required to accept.

Similarly, the Connecticut Supreme Court's conclusion that the possibility of a constitutional takings claim by the landowners did not satisfy Connecticut's adverse use requirement is also a binding statement of state law. The Connecticut Court strongly suggested that it would not "ever require a landowner to assert a constitutional takings claim in order to avoid the acquisition of a prescriptive avigation easement," and squarely held that on the record before it defendant landowners "were not obliged to do so." Id. at 504. These also are statements as to what constitutes sufficient adverse use under Connecticut state law.

Therefore, we are bound by the decision of the Connecticut Supreme

Court that the County could not as a matter of Connecticut law acquire a prescriptive avigation easement on the facts of this case. The district court's June 2, 1993 grant of partial summary judgment to the County on its prescriptive easement claim is reversed. The district court is directed to enter judgment for the landowners on that claim, and the case is remanded for further proceedings consistent with this opinion. Such remand is without prejudice to determination of the remaining claims and to the right of any party after final judgment to appeal all issues not decided by us in this opinion.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 10th day of November, one thousand nine hundred and ninety-three.

Present: HON. WILFRED FEINBERG, SDNY
HON. AMALYA L. KEARSE, 90-cv-1302
Circuit Judges. GOETTEL

COUNTY OF WESTCHESTER, NEW YORK,
Plaintiff-Appellee,

- against -

COMMISSIONER OF TRANSPORTATION OF THE STATE OF CONNECTICUT,
Defendant,
TOWN OF GREENWICH; LAURELTON NURSING HOME, INCORPORATED; GREENWICH KING STREET ASSOCIATES II, L.P.; MILDRED TOMONTO, CONVENT OF THE SACRED HEART,
Defendants-Appellants,
LAUREL CONVALESCENT HOME, INC.,
Appellant.

Docket Nos.
92-7698
92-7700
92-7704
92-7706
92-7726
93-7018

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York and was argued by counsel.

Docket Nos. 92-7698, -7700, -7704, -7706, -7726, 7018

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the order of said district court be and it hereby is reversed and the action be and it hereby is remanded to the said district court for further proceedings in accordance with the opinion of this Court.

EIAINE B. GOLDSMITH, Clerk
By:

s/
Edward J. Guardaro,
Staff Attorney

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* The Honorable Robert F. Peckham, Senior United States District Judge for the Northern District of California, who was sitting by designation at the time of oral argument, passed away on February 16, 1993. The County of Westchester has filed a motion seeking to reconstitute the panel with a third çudge, arguing that "additional delay, in the event of the inability of a two judge panel to reach a decision, is unnecessary and should be avoided." However, the remaining members of the panel agree on the disposition of this appeal, and the local rules of this Circuit permit us to issue an opinion without replacing Judge Peckham. Local Rule § 0.14(b). Therefore we deny the County's motion to reconstitute the panel.

MANDATE
UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 10th day of November, one thousand nine hundred and ninety-three.

Present: HON. WILFRED FEINBERG, SDNY
HON. AMALYA L. KEARSE, 90-cv-1302
Circuit Judges. GOETTEL

COUNTY OF WESTCHESTER, NEW YORK,
Plaintiff-Appellee,

- against -

COMMISSIONER OF TRANSPORTATION OF THE STATE OF CONNECTICUT,
Defendant,
TOWN OF GREENWICH; LAURELTON NURSING HOME, INCORPORATED; GREENWICH KING STREET ASSOCIATES II, L.P.; MILDRED TOMONTO, CONVENT OF THE SACRED HEART,
Defendants-Appellants,
LAUREL CONVALESCENT HOME, INC.,
Appellant.

Docket Nos.
92-7698
92-7700
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92-7726
93-7018

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United State District Court for the Southern District of New York and was argued by counsel.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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COUNTY OF WESTCHESTER,

Plaintiff,

- against -

90 Civ 1302 (GLG)

O P I N I O N

TOWN OF GREENWICH, CONNECTICUT, COMMISSIONER OF TRANSPORTATION OF THE STATE OF CONNECTICUT, LAURELTON NURSING HOME, INC., GREENWICH KING STREET ASSOCIATES II, L.P., THE CONVENT OF THE SACRED HEART, and MILDRED TOMONTO,

Defendants.

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Of Counsel

G O E T T E L, D. J.,

I think that I shall never see a lawsuit as lovely as a tree. One may well wonder whether this would have been the opening of Joyce Kilmer's poem had his experience with trees included an intimate association with this case. While trees may indeed make lovely poems, they lose some of their aesthetic appeal when made the subject of litigation.

We return to the continuing saga of the County of Westchester's efforts to clear the airspace over property owned by several landowners on the Connecticut side of the border separating New York from Connecticut. Reduced to its simplest terms, this case represents the proverbial struggle matching commerce against nature, airplanes against trees.

I. FACTUAL BACKGROUND

While the background of this case has been outlined in previous opinions, see 745 F.Supp. 951 (S.D.N.Y. 1990) and 756 F.Supp. 154 (S.D.N.Y. 1991), we shall detail the material facts so that our decision may be understood by those unfamiliar with the ongoing trials and tribulations of the Westchester County Airport.

Plaintiff, the County of Westchester, located in the State of New York, owns and operates the Westchester County Airport ("WCA") which abuts the border between New York and Connecticut. Defendants are all residents of Connecticut who own parcels of land on the Connecticut side of the border situated on or near the state line. The airport began operations more than forty years ago and is presently used by both private and commercial

aircraft. It has developed into a busy regional airport servicing the air transportation needs of both New York and Connecticut residents.

The WCA currently utilizes two runways. Runway 16/34, the airport's primary runway, runs in a roughly northeast-southwestern direction for 6550 feet. Runway 11/29, the alternative runway embroiled in this dispute, is a 4450 foot long landing strip without an instrument landing approach, angled in a roughly east-west direction. Runway 11/29 is sandwiched between Interstate Highway 684 and Rye Lake on its western end and the Connecticut border on its eastern end. It is usually used only when the prevailing crosswinds make use of the main runway too dangerous for all but the largest classes of aircraft or

during an emergency. Since the opening of the airport, runway 11/29 has been used frequently, ranging from as few as a dozen flights up to sometimes 80 flights per day.

The controversies in this case are, quite literally, rooted in the southeastern end of runway 11/29 fronting the New York Connecticut border. Like all airstrips, runway 11/29 has an approach zone of airspace stretching out from its ends. On its southeastern end, runway 11/29, rather unfortunately, has an air approach located almost entirely in Connecticut. Accompanying the actual flight path used by airplanes while taking off and landing, the Federal Aviation Administration ("FAA") requires that buffers of airspace, known as "clear zones," exist above certain imaginary

surfaces.

The FAA has determined that safe operation of airplanes requires that areas above these surfaces be kept clear of obstructions. See Flowers Mill Associates v. Unites States, 23 Cl.Ct. 182 (1991). FAA regulations specifically define two types of clears zones that are significant for this case: a trapezoidal-shaped "approach surface" beginning from a point 200 feet beyond the end of the runway and extending outward for a distance of 5,200 feet at a slope of one foot vertical rise for each 20 feet in horizontal distance (20:1), see 14 C.F.R. § 77.25(d), and a supplemental "transitional surface" rising from each side of the approach zone at a slope of one foot of vertical rise for every 7 feet of horizontal rise (7:1). See 14

C.F.R. § 77.25(e).[1]

The land underneath this airspace is owned by the various defendants, the Town of Greenwich, the Laurelton Nursing Home, Inc., the Convent of the Sacred Heart, Greenwich King Street Associates II, L.P., and Mildred Tomonto. Defendants' lands are filled with trees that over the years have, not surprisingly, been growing. Over time, an increasing number of trees located on the defendants' properties have grown into runway 11/29's clear zones

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[1]The FAA regulations use the term "clear zones" to refer collectively to the various imaginary surfaces they define. See, e.g., 14 C.F.R. § 152.107(e)(1). Unless the discussion is specifically focused on one of these FAA-defined surfaces, the court shall use the term "clear zones" to refer generally to the airspace needed by airplanes as a safety buffer between the plane and objects on the earth's surface, airspace which would include both the FAA's approach (20:1) and transitional (7:1) zones.

eventually forcing aircraft using this runway to dramatically alter their landing patterns.

Documentation of this growth has been uneven. Testimony from pilots and a 1948 color photograph of the area show the existence of vacant fields with identifiable lines of trees along property boundaries and King Street, as well as clusters of trees on the Convent's property. The National Oceanographic and Atmospheric Administration ("NOAA"), a federal agency, has periodically surveyed runway 11/29's obstructions between 1949 and 1990 and produced official charts of the clear zones.

The 1950 NOAA chart shows two, possibly three, trees penetrating runway 11/29's 20:1 clear zone. In 1964, the NOAA chart shows 5 trees encroaching on

the approach surface and 3 trees in the transitional surface. In 1970, NOAA individually identified 5 trees above the approach surface and 3 trees breaking the transitional surface.[2] The 1970 chart also documented wooded areas within the clear zones along the entire length of King Street, falling within the 20:1 clear zone as well as three larger wooded areas inside the 7:1 transitional zone. By 1982, NOAA separately identified 4 trees inside the 20:1 approach zone and 5 trees within

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[2]Oddly enough, it appears that the 5 trees individually identified inside the primary zone in 1964 and 1970 are not the same 5 trees. Assuming the NOAA's numbering of the trees remained consistent in these years, 3 of the 5 trees penetrating the primary zone in 1964 were replaced by 3 different trees in 1970. There exists photographic evidence of trees being cut down which may explain this discrepancy. For the moment, however, this issue is of little consequence.

the 7:1 transitional zone. Again, the 1982 chart noted wooded areas along nearly the entire length of King Street and also penetrating the left edge of the 20:1 approach zone. Also, significantly larger clusters of trees existed in the transitional clear zone bordering the left side of the 20:1 approach zone.

In 1984, the WCA contracted with a surveyor to determine the precise heights of obstructions to runway 11/29's clear zones using photogrammetric analysis. The results of the 1984 Donnelly survey show some 125 trees penetrating runway 11/29's clear zones. In 1990, Donnelly was again commissioned to survey the clear zones and documented some 128 trees inside the clear zone of which 55 were penetrating the 20:1 clear zone. There

were also an additional 6 trees whose tops were broken but which had penetrated the clear zones in 1984.

In sum, the number of trees encroaching on runway 11/29's clear zones has increased significantly over the past forty-two years.[3] The changes in the land use have varied to some degree by defendant. Greenwich King Street Associates, a limited partnership, owns some 152 acres of property which has witnessed the most dramatic growth. What was primarily fields lined with a row of trees in

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[3]In both the NOAA and Donnelly charts, it appears that in certain areas within the defendants' properties it was not feasible to individually identify every tree due to the denseness of the forest. The true extent of the trees occupation of the clear zones cannot be determined. It is entirely possible, indeed likely, that the actual number of trees obstructing runway 11/29's clear zones is higher than currently identified.

1948, before it purchased the property, has been transformed into a maturing forest.

Photographic evidence seems to indicate that a portion of King Street Associate's land had been used as a tree nursery for an uncertain period of time beginning in the 1960s, before King Street Associates acquired it. The nursery was subsequently abandoned and apparently many of the trees were left to grow wild. King Street Associate's property lies directly adjacent to the airport and underneath runway 11/29's center line. In 1989, the County proposed to remove or top infringing trees at its own expense while covering the cost of any landscaping necessary, but nothing ever came of the offer.

Defendant Laurelton Nursing Home's property contains fewer trees intruding

on runway 11/29's clear zones, primarily concentrated near the intersection of the primary and transitional zones near the northern border of the property. Plaintiff notes that defendant Laurelton Nursing Home was required to get approval, which it did, from the FAA as a condition precedent to its construction of the nursing home.

Defendant Mildred Tomonto's property also contains fewer intrusive trees by comparison than exist on Greenwich King Street Associates' land. Tomonto's trees are located immediately adjacent to the airport, on the north side of the land near the Tomonto house, and along its boundary with the Laurelton Nursing Home. While fewer in number, the Tomonto trees are disproportionately problematic because they are growing near runway 11/29's center line. In

1989, the CWA requested permission of Tomonto to enter her property to cut down certain trees inside the clear zones. The CWA maintains that it received no response from Ms. Tomonto, interpreting this as a rejection of its offer.

The Town of Greenwich, in its management of King Street as a public thoroughfare, has assumed responsibility for maintenance of the trees lining King Street. King Street traverses the entire width of the 20:1 clear zone crossing runway 11/29's center line some 1200 feet from the end of the runway. Its trees have grown substantially over the years.

In 1963, the Town's Planning and Zoning Commission adopted a Land Use Plan of Development that included the Commission's proposal to control the use

of land within the CWA's clear zones to "prevent the erection of structures within them." The Plan was a statement of land use objectives that carried with it no direct effect on land use within Greenwich. Its implementation depended upon actions by other Town agencies and the willingness of property owners in developing their lands in conformance with the plan.

The CWA's clear zones, however, have been factored into the zoning and construction permitting process of the Town of Greenwich. In December 1963, the Town's Planning and Zoning Commission recommended the denial of defendant Laurelton Nursing Home's application to build a nursing home adjacent to King Street specifically because of its safety concerns over locating the proposed building within

one of the CWA's runway clear zones.

In 1975, the Town's Planning and Zoning Board of Appeals denied an appeal for a zoning variance that would have permitted the start of a tree surgery business and the parking of road equipment on the western side of King Street. The Board found that the applicants were not uniquely burdened by the CWA since the airport was a common burden on all that area's property owners.

On April 27, 1987, the Board denied an appeal by Greenwich King Street Associates I, L.P. to erect an office building on the east side of King Street. Again, the Board concluded that the hardship on the applicant caused by the neighboring airport was a common burden on all property owners in the area and did not justify a unique

hardship variance to the zoning regulations.

Compared to the other defendants, the property belonging to defendant Convent of the Sacred Heart is set furthest from runway 11/29. The bulk of the Convent's trees penetrating the clear zones are located near the Convent's main building. Many of these trees existed when the CWA first opened, although may others are newer. A number of them stand under runway 11/29's center line, and like those lining King Street, can partially block a pilot's view of the runway during a final approach. The Convent's trees have seen substantial growth. The Convent admits that it has maintained and nurtured its trees over the years and desired its trees along King Street to provide screening from the airport.

Information concerning tree intrusions into runway 11/29's clear zones was first brought to the CWA's attention as early as 1969. In March 1981, after conducting on site inspections of the airport, the FAA informed the CWA by letter that tree obstructions were observed in the clear zones and approaches to runway 11/29. The FAA requested the CWA to initiate action to remove the obstructive trees. Three months later, the FAA reiterated its position regarding the removal of trees within runway 11/29's clear zones and recommended displacement of the runway landing threshold if removal was not possible.

The FAA's attention to runway 11/29 resurfaced in September 1984 when it requested that the CWA document all penetrations of its clear zones and

provide a scheduled plan of action for the removal of any obstructions, or displace the runway threshold. The FAA set a December 1984 deadline for receipt of the information.

The CWA responded in October 1984 advising the FAA that it had issued a "notice to airmen" or "NOTAM" advising pilots to use steeper descents when approaching runway 11/29 in order to clear the trees blocking the clear zones. The CWA also informed the FAA that an aerial survey had been conducted and was being charted. The preliminary results were that some 79 trees in Connecticut currently encroached upon the clear zones. The CWA concluded that it was researching its legal options and would incorporate the NOAA's obstruction chart findings into its study.

Again in early February 1985, the

FAA contacted the CWA asking for an evaluation of the latest obstruction chart produced by the NOAA, a plan of action, and a timetable for disposing of each obstruction. The FAA reset the deadline to February 28, 1985. Apparently venting frustration with the CWA's lack of progress, the FAA sent a terse letter in May 1985 stating that prompt action in the form of tree removal or runway displacement was necessary since the tree penetrations into runway 11/29's clear zones were substantial and hazardous.

The dialogue between the FAA and the CWA continued through 1989. Another FAA warning was communicated to the CWA in October 1988 stating that immediate action was required to remove the multiple intrusions into runway 11/29's clear zones that threatened the safety

of landing aircraft. The FAA warned that if the trees were not removed or topped by the end of October 1988, it would order the displacement the runway's landing threshold.

True to its promise, in February 1989, the FAA ordered runway 11/29's landing threshold to be displaced, effectively shortening the usable runway by some 1300 feet. Some time later, the Connecticut property owners rejected an offer by the County to trim the trees back to an acceptable height at the County's expense. The County projects that by the year 2000, the runway will require a displacement of some 1700 feet, a loss severe enough to possibly shut down runway 11/29.

In February 1990, the County of Westchester instituted an action for declaratory and injunctive relief

against the Town of Greenwich, the Commissioner of Transportation for the State of Connecticut, Laurelton Nursing Some (sic), Greenwich King Street Associates II, the Convent of the Sacred Heart, and Mildred Tomonto. In an earlier decision, this court dismissed plaintiff's state law cause of action against the Commissioner of Transportation of the State of Connecticut holding that the Eleventh Amendment to the United States Constitution prohibited such suits. The court also dismissed plaintiff's claims against the remaining defendants under the interstate commerce clause of the Constitution, the Federal Aviation Act, and public nuisance under Connecticut's statutory law.

The County has three remaining causes of action before this court:

prescriptive easement, common law nuisance, and equitable servitude. First, the County contends that under Connecticut law it has acquired a prescriptive easement over the airspace used to navigate landings and takeoffs from runway 11/29 through its use over the past forty or more years. According to the County, this corridor of airspace approaching runway 11/29 has existed and been used without any material obstructions from 1945 up through the early 1970s. This airspace, argues plaintiff, is located directly above the imaginary surfaces specified by the FAA and provides a safety buffer of air between the flight path and the nearest object on the surface. Plaintiff argues that by flying through its approach paths it has used this corridor of airspace-- what it terms clear zones--

as a safety buffer for purposes of acquiring a prescriptive easement.

Defendants offer several arguments in response. At base, they argue that the County can point to no fifteen-year period during which planes used the approach to runway 11/29 with its clear zones devoid of trees. Indeed, defendants contend that trees have penetrated the clear zones since 1949 and in significant numbers at least since 1970 when they extended across the primary zone.

Defendants further argue that the County's conduct belies any notion that it was acting under a claim of right. The County repeatedly attempted to secure permission from the landowners to trim the troublesome trees and generally failed to act in a manner which put defendants on notice of their use of the

clear zones as a claim of right. Citing Connecticut laws on easements, they also stress that prescriptive easements may only extend to those portions of another's property that have been actually or physically used. In their view, the County can acquire a prescriptive easement under Connecticut law only over the airspace in which its planes actually flew, provided it meets the other easement requirements, something defendants strongly contest. Since no planes continuously flew through the clear zones (as contrasted to flight paths) for a fifteen year period, no prescriptive easement to this airspace ever matured.

Even assuming that the County secured a prescriptive easement over the clear zones, defendants claim to have regained their rights to this airspace

by reoccupying the clear zones with their trees for more than fifteen years, in essence supplanting any easement the County may have secured with a subsequent prescriptive easement of their own.

Defendants also claim that the use of the clear zones airspace for trees is both reasonable and lawful as a matter of law, precluding any finding of a nuisance. In their view, locating a runway adjacent to a wooded, suburban, residential property was the unreasonable action, not the growing of trees. Granting the County its easement, says defendants, will force the clearing of trees down to such low airspaces as to unreasonably restrict the defendants' use of their properties. Moreover, they argue, given the County's actual knowledge of the

tree obstructions since 1969, its persistent inaction prevents it from seeking its equitable relief now under the doctrine of laches.

II. DISCUSSION

Plaintiff and all of the remaining defendants have moved for summary judgment on the claims of prescriptive easement, public nuisance, and equitable servitude, each arguing that no material facts exist to preclude this court from ruling on the issues as a matter of law.

The standards for summary judgment are firmly rooted in our legal landscape. To prevail, the moving party must demonstrate "that there is no genuine issue as to any material fact and that [it] is entitled to a judgment as a matter of law," Fed.R.Civ.P. 56(c). Material facts are those facts

that "might affect the outcome of the suit under the governing law...[f]actual disputes that are irrelevant or unnecessary will not be counted." Anderson v. Liberty Lobby, 477 U.S. 242, 248 (1986). A dispute over a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id. All parties in this case contend that the evidence presented leaves no materials facts in dispute.

The court must resolve all ambiguities and draw all inferences in favor of the party defending against the motion. Eastway Const. Corp. v. City of New York, 762 F.2d 243, 249 (2d Cir. 1985), cert. denied, 484 U.S. 918 (1987). Uncertainty regarding the true state of any material fact will defeat a summary judgment motion. United States

v. One Tintoretto Painting Entitled "The Holy Family With St. Catherine and Honored Donor", 691 F.2d 603, 606 (2d Cir. 1982).

The County of Westchester claims that it is entitled to the unobstructed use of runway 11/29 including the clear zones which accompany its use.[4] In

[4]We note an additional motivation behind the County's present litigation. The County has planned to expand the airport by adding an additional runway and a new terminal. To be eligible for federal grants for airport development projects under the federal-aid Airport Program, the County must "own, acquire, or agree to acquire control over, or a property interest in, runway clear zones that the Administrator considers adequate." 14 C.F.R. § 152-107(e)(1) (1991); see also 14 C.F.R. § 151.11. An airport possesses a sufficient property interest "if it has an easement...giving it enough control to rid the clear zone of all obstructions (objects so far as they project above the approach surfaces established by § 77.27 (b) and (c) of Part 77 of this chapter), and to prevent the creation of future obstructions; together with the right of entrance and exit for those purposes, to ensure the

response, defendants contend that the County has not established any easements, and even if so, defendants have regained by prescription an easement giving their trees the right to continued upward mobility. This court previously held that the County's causes of action are rooted in Connecticut law. County of Westchester v. Town of Greenwich, 745 F.Supp. 951, 957 n. 7 (S.D.N.Y. 1990). It is under this canopy of law that we shall attempt to resolve these issues.

A. The Common Sun, The Air, The Skies[5]: Federal Law on Airspace

Although this court previously held that federal regulation of the nation's

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safe and unrestricted passage of aircraft in and over the area." 14 C.F.R. §151.9.

[5]Thomas Gray, Ode on the Pleasure Arising from Vicissitude, l. 49.

airspace provides no foundation for a cause of action by the County, we shall outline the federal law on airspace which stands as a backdrop for our decision.

The navigable airspace of the United States has been incorporated into the public domain. See City of Oakland v. Nutter, 13 Cal.App.3d 752 (1st Dist. 1970) (citing cases); Shipp v. Louisville & Jefferson County Air Bd., 431 S.W.2d 867, 870 (Ky. 1968), cert. denied, 393 U.S. 1088 (1969). Congress, expressing its sovereignty over the nation's navigable airspace, has recognized "a public right of freedom of transit through the navigable airspace of the United States." 49 U.S.C. § 1304. "Navigable airspace" is defined as:

> airspace above the minimum altitudes of flight prescribed by regulations issued under this chapter, and shall include airspace needed to insure

> safety in take-off and landing of aircraft.

49 U.S.C. § 1301(24). This navigable airspace extends down to an imaginary surface 50 feet above the surface of defendants' lands. See 14 C.F.R. § 151.9(b).

Effectively, federal law has pruned the bundle of property rights held by surface landowners rather than uprooted it in its entirety. They retain the right to the use and enjoyment of their land including the immediate airspace that can be reasonably used. "We own so much of the space above the ground as we can occupy or make use of, in connection with the enjoyment of our land. This right is not fixed. It varies with our varying needs." Allegheny Airlines, Inc. v. Village of Cedarhurst, 132 F.Supp. 871, 879 (E.D.N.Y. 1955), aff'd,

238 F.2d 812 (2d Cir. 1956) (quoting Hinman v. Pacific Air Transport, 84 F.2d 755, 758 (9th Cir. 1936)); see also Jackson Municipal Airport Authority v. Evans, 191 So.2d 126 (Miss. 1966); Mills v. Orcas Power & Light Co., 56 Wash. 2d 807, 355 P.2d 781 (1960).

Low altitude flights which unreasonably interfere with the use and enjoyment of the land represent a trespass or partial taking creating a right to compensation. See United States v. Causby, 328 U.S. 256 (1946). As the Court stated in Causby:

> The airspace, apart from the immediate reaches above the land, is part of the public domain. We need not determine at this time what those precise limits are. Flights over private land are not a taking, unless they are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land.

Id. at 266. Even when such flights fall

within the navigable airspace, and therefore use of this low altitude airspace is authorized, compensation is still required for the taking. See Griggs v. County of Allegheny, 369 U.S. 84, 88-89 (1962).

This case is unique, largely because the airport seeking easements is located in a different state from the adjacent landowners whose airspace is at issue. We previously held that FAA regulations furnish no basis for the County to compel the removal of the trees. County of Westchester, 745 F.Supp. at 955-57. The County, powerless to exercise eminent domain over property across the state line, was forced to resort to remedies provided under Connecticut law. Thus, we must turn to the question of what rights and remedies exist for the parties under Connecticut law

concerning the airspace immediately above defendants' properties.

B. Flying Chariots Through Fields of Air[6]: Prescriptive Easements

Connecticut law on prescriptive easements is clear. Be it flying machines or growing trees, to show the existence of an easement by prescription a person must show use that is open, visible, continuous, uninterrupted, and adverse, made under a claim of right for a period of fifteen years. Klar Crest Realty, Inc. v. Rajon Realty Corp., 190 Conn. 163 (1983); McCullough v. Waterfront Park Ass'n, Inc., 1992 Conn. Super. LEXIS 240 (Conn. Sup. Ct. 1992);

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[6]Erasmus Darwin, The Botanic Garden, pt. I. The full stanza reads:

> Soon shall thy arm, unconquered steam! afar
> Drag the slow barge, or drive the rapid car;
> Or on wide-waving wings expanded bear
> The flying-chariot through the fields of air.

see also Conn. Gen. Stat. Ann. § 47-37 (West 1988) (requiring fifteen years of continuous, uninterrupted use for easements).

The term "under claim of right" means "without recognition of the rights of the owner of the servient estate." Andrejczyk v. Advo System, Inc., 146 Conn. 428, 151 A.2d 881, 883 (1959). A prescriptive easement is valid only if its boundaries can be determined with reasonable certainty. See Reynolds v. Soffer, 190 Conn. 184 (1983); Keiko v. Dolinger, 184 Conn. 509 (1981).

The County maintains that it has acquired such an easement over a corridor of airspace through which planes using runway 11/29 navigate, airspace that includes the so-called clear zones. At the outset, we must be clear as to the nature of the easements

being contested. The County has the tendency to speak of its rights as encompassed within a single easement. Defendants correspondingly maintain that the existence of trees inside the clear zones since the airport's opening undercuts the County's easement claim entirely in one fell swoop.

Although the core of the County's claim seems to be its right to remove defendants' trees from the clear zones, its claim represents a combination of rights of usage encompassing two separate easements. The County asserts an avigation or flight easement giving it a right to fly through the airspace above defendants' properties. Concurrently, it seeks a clearance easement providing it the right to cut down those trees obstructing the approach to runway 11/29 and its clear

zones.

These two easements are distinct. See United States v. Brondum, 272 F.2d 642, 644-45 (5th Cir. 1959) (distinguishing avigation from clearance easements); United States v. 64.88 Acres of Land, 244 F.2d 534, 535-36 (3rd Cir. 1957); see also City of Oakland v. Nutter, 13 Cal.App.3d at 763. The purpose of avigation easements is to allow aircraft to fly through a given airspace. The function of the clearance easement, likened to a ceiling, is:

> to increase the margin of safety for flying by assuring that the glide zone will be free from natural growth or man-made obstructions and the pilot's vision unobscured above a designated altitude.

City of Oakland v. Nutter, 13 Cal.App.3d at 763.

From the tenor of its arguments, it is apparent that the County seeks

recognition of both types of easements. First, it seeks an avigation easement over the glide path for runway 11/29 that aircraft used before the trees forced significant changes in flight paths. Second, the County seeks a clearance easement allowing it to remove, or at least top, trees encroaching upon the airspace located within runway 11/29's clear zones, airspace located between the lower limits of the navigable airspace and the upper limits of usable airspace above defendants' lands.

C. Objects in an Airy Height[7]: Existence of Easements Under Connecticut Law

Before determining whether the

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[7]Matthew Prior, To the Honorable Charles Montague, which reads in part:

> Our hopes, like towering falcons, aim
> At objects in an airy height;
> The little pleasure of the game
> Is from afar to view the flight.

County has met the requirements of establishing a prescriptive avigation or clearance easement for runway 11/29's clear zones, our initial inquiry is whether such easements are even cognizable under Connecticut law.

1. The Avigation Easement

It appears that Connecticut courts have yet to reach the question of whether avigation easements may be acquired by prescription. Among the few jurisdictions that have addressed this issue, there is general disagreement over whether an avigation easement may be acquired by prescription.

While not deciding the existence of a prescriptive avigation easement on the facts before it, the California Court of Appeals has stated that it saw "no reason why an avigation easement may not be acquired by prescription in this

state." Drennen v. County of Ventura, 38 Cal.App.3d 84, 87 n. 2 (2nd Dist. 1974). The court in Petersen v. Port of Seattle, 94 Wash.2d 479, 618 P.2d 67 (1980), while also concluding that no such easement had been evidenced, similarly recognized the existence of prescriptive avigation easements. See id. at 70-71.

The Supreme Court of Appeals for West Virginia, however, reached a contrary conclusion. Emphasizing the practical difficulties in recognizing and defining prescriptive avigation easements, the court in Sticklen v. Kittle, 168 W.Va. 147 (1981), held that prescriptive easements of avigation did not exist. The court voiced its concern that changes in the types and frequency of overflying aircraft, multiple flight patterns, and overflights of several

different tracts of land create intractable problems in defining the boundaries and uses of a particular avigation easement. See id. at 155.

While the status of an avigation easement under Connecticut is unfixed at present, we are persuaded that recognition of a prescriptive avigation easement is the proper course. As we stated in an earlier opinion, it stands to reason that if overflights are considered a definite enough act to form the basis of a constitutional takings claim, such activity should be considered tangible enough to form the basis of a prescriptive easement. See County of Westchester v. Town of Greenwich, 745 F.Supp. at 961. Whether a party's actions sufficiently establish an easement's boundaries with a reasonable degree a certainty would

generally be a question of fact requiring resolution by the trier of fact.

2. The Clearance Easement

Determining the status of clearance easements under Connecticut law is a more difficult task. It has been stated as a general proposition that negative easements, easements preventing someone from using a given property, cannot be established by prescription "because the claimant of such an easement does not become subject to legal action at the hands of the owner of the potential servient estate by engaging in the conduct appropriate to establish such an easement." Classen v. State, Dept. of Highways, 621 P.2d 15, 18 (Alaska 1980) (quoting 3 R. Powell, The Law of Real Property ¶ 413, at 34-119 (Rohen rev. ed. 1979)). Clearance easements would

seem to fall in this category, essentially representing a right to prevent surface landowners from using certain airspace.

Underlying this general rule is the notion that an airport seeking a clearance easement cannot satisfy the requirements that its use be adverse, open, visible, and actual. Defendants contend that use of a clear zone, by definition an empty zone of airspace absent some emergency, cannot be an open and visible use which constitutes an action adverse to the owner's rights to the airspace giving it knowledge and opportunity to asserts it own property rights in opposition. See Aksomitas v. The South End Realty Co., 136 Conn. 277, 70 A.2d 552, 554 (1949) ("[U]se must be so open, visible, and notorious as to give the owner knowledge and a full

opportunity to assert his own rights."). Thus, the argument goes, no prescriptive clearance easements can develop as a matter of law.

We have been unable to find any Connecticut authority directly addressing whether clearance easements may be acquired by prescription. The possibility of establishing a clearance easement to airspace by prescription has been implicitly recognized in other jurisdictions. See, e.g., Shipp, 431 S.W.2d at 870.[8] Connecticut courts,

[8]The court in Shipp v. Louisville & Jefferson County Air Bd., 431 S.W.2d 867 (Ky. 1968), refused to recognize the Air Board's acquisition of a prescriptive easement holding that the landowners' right to grow trees inside the contested zone of airspace had been established prior to the promulgation of the FAA regulations or the installation of the VASI system. In short, the property owners' rights to use the airspace matured before the rights of the Air Board, derived from Federal Aviation Act of 1958, germinated.

however, have discussed other types of use, beneficial to the public, which do not seem to meet, on their face, the requirements of an actual physical use.

The court in American Trading Real Estate Properties, Inc. v. Town of Trumbull, 215 Conn. 68, 574 A.2d 796 (1990), addressed the notion of "actual public use" when an adverse possession claim is made against a town. The Connecticut Supreme Court found that limiting the definition of public use to physical uses only was unduly narrow. American Trading, 574 A.2d at 801-02. The court discussed a town's use of a buffer of undeveloped property to protect a park from encroaching development. It also imagined the use of open space or undisturbed land to protect communities, wildlife, or wetlands. Id. Recognition of such

nonphysical uses was deemed necessary to protect the existence of highly beneficial public interests like the environment.

Other courts have also viewed the concept of actual use as encompassing more than simply what is physically occupied. See, e.g., Platt v. Ingham County Road Commission, 40 Mich.App. 438, 440 (Ct.App. 1972) ("Since a right-of-way is deemed to encompass such use of the land at or beneath the surface as will make the easement effective, a similar concept of use must be employed in determining 'actual use,'").

Protecting the ability of aircraft to use the CWA's runway 11/29 requires recognition of an analogous buffer of unused airspace. Safeguarding the passage of aircraft over populated areas

is obviously of paramount concern to the County, and presumably to Connecticut as well. The Commissioner of Transportation for Connecticut has to date shown no interest protecting its citizens, who use the CWA in significant numbers, by removing the trees from runway 11/29's clear zones. The Commissioner is apparently empowered by statute to require owners of any obstacles constituting a hazard to aerial navigation to remove those obstacles.[9]

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[9]Section 15-74(a) of the Connecticut General Statutes states that:

> The commissioner shall notify the owner or person responsible for the existence of <u>any</u> obstacle so located as to constitute a hazard to aerial navigation or to the efficient or safe use of <u>any</u> airport, requiring such owner or other person to remove such obstacle within such reasonable time as is fixed by said

While it is by no means clear, we conclude that Connecticut law would recognize the establishment of a clearance easement by prescription. Connecticut recognizes certain non-physical uses of land when they serve important, even vital, public needs. Moreover, in the case of airspace,

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commissioner. The owner or owners of such airport shall pay to the owner of such obstacle just compensation for such removal.

Conn. Gen. Stat. § 15-74(a) (emphasis added). The provision includes nothing limiting its application to only those obstacles that are hazardous to airports located within Connecticut. Indeed, such a restriction would emasculate the clear purpose for this provision, to protect Connecticut citizens from and aerial accidents caused by obstructions located within the state.

Other sections, intended to be applied more narrowly, state such restrictions clearly. See, e.g., 15 Conn. Gen. Stat. § 15-73 (limited to airports acquired or operated by the state); 15 Conn. Gen. Stat. § 15-76(a) (limited to any airport or landing field

federal regulations specifically define the existence of such zones of airspace. The public is on general notice that aircraft passing overhead maintain their safe passage by relying upon clear zones underneath their glide paths. Under these circumstances, to insure the safe use of these flight paths, we conclude that clearance easements to such airspace can be acquired by prescription.

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located in the state); 15 Conn. Gen. Stat. § 15-90 (applying only to publicly-owned airports in the state). The plain meaning of § 15-74 is that the overriding safety concerns associated with aerial hazards merited granting the Commissioner broad authority to order the removal of any obstacles to aerial navigation standing within Connecticut's borders.

The Connecticut Supreme Court seems to agree. It has stated that "Section 15-74 applies to all airports, while § 15-73 applies only to state acquired or operated and municipal airports. Section 15-74 is not inconsistent with §§ 15-73, 13b-4o and 13b-44 to the extent it applies to nonstate,

D. Saw The Heavens Fill With Commerce[10]: Establishment of an Avigation Easement

Given their legal existence, the question remains whether the County's use of runway 11/29 meets the requirements for establishing a prescriptive easement over the airspace needed for its flight paths and clear zones. In assessing the County's claims, we shall treat the prescriptive

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nonmunicipal airports." Powers v. Ulichny, 185 Conn. 145, 440 A.2d 885, 891 (1981).

[10]Lord Alfred Tennyson, Locksley Hall, which reads in part:

> For I dipped into the future, far as human eye could see,
> Saw the Vision of the world, and all the wonder that would be;
> Saw the heavens fill with commerce, argosies of magic sails,
> Pilots of the purple twilight, dropping down with costly bales;
> Heard the heavens fill with shouting, and there rained a ghastly dew
> From the nations' airy navies grappling in the central blue.

easement requirements as falling within two broader categories. The first grouping of easement criteria define the physical nature of the use that places an owner on notice. These notice-oriented criteria include the requirements of adverse, open, and visible use under a claim of right. The second set of criteria address the more temporal aspects of easements, that is the requirements of continuous, uninterrupted use for at least fifteen years.

1. Cannot See the Glide Path For The Trees?: The Notice Criteria For Easements

We begin by addressing the County's prescriptive avigation easement claim. The County is seeking to reestablish its ability to use the glide path for runway 11/29 that aircraft had used until defendants' trees forced planes to

substantially adjust their takeoff and landing patterns. We shall confine our analysis here to the airspace actually used by the County for its approach path to runway 11/29, namely the airspace that aircraft flew through.

We first examine the first branch of the easement criteria, the open, visible, and adverse requirements for a prescriptive easement. We have no trouble concluding that the County's use of the glide paths was open and visible. Aircraft regularly passing overhead during their landings and takeoffs are hard to miss. And defendants have offered no evidence that any Stealth fighters operated on runway 11/29 or that any of the aircraft used the infamous Romulan cloaking device.[11]

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[11]For those unacquainted with the television series "Star Trek," this

For the clearance easement sought by the County, defendants contend that the County cannot show that use of clear zones, which are essentially empty airspaces, can be open, visible, or adverse. While this position carries a certain common sensical force, we do not reach the same legal conclusion. Although clear zones are at base a buffer of unobstructed airspace between an airplane and the top of any surface obstructions, this does not mean by definition that the open and visible easement requirements cannot be met.

Defendants do not contend that they were unaware of the constant overflight of aircraft using runway 11/29 over the years. Anyone watching a plane pass

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reference is to a device used by a civilization of beings called Romulans which rendered their spacecraft invisible to the naked eye.

overhead, besides seeing the basic flight path, would certainly see a buffer of airspace underneath the flight path separating the plane from the nearest obstacle. On occasion, particularly in foul weather, flights will drop below the prescribed glide path, making use of the safety buffer.

On the issue of whether use of the glide path for the avigation easement was adverse, we reach a similar conclusion. The defendants' properties lie beneath runway 11/29's approach path. In the case of Greenwich King Street Associates, their land directly abuts the airport. Any conceivable take off or landing path must pass through airspace over these lands at altitudes low enough to be considered adverse. As defendants concede, the FAA-defined approach path lies at its lowest point

within 31 feet of the surface of Tomonto's property and 17 feet above Greenwich King Street Associates' land. See Defendant Tomonto's Memorandum of Law at 3; Greenwich King Street Associate's Memorandum of Law at 7.

Aircraft passing at such low altitudes above defendants' properties doubtless represent an adverse use. The County's use of the airspace for flight paths and safety buffers is incompatible with the defendants' desire to grow their trees in this airspace. Therefore, we conclude that the County's use of runway 11/29's flight path has been open, visible, and adverse.

The question of adversity for the clearance easement is a more difficult issue. As with the avigation easement, aircraft following a 3-degree glide path buffered by a clear zone lying above the

FAA-defined 20:1 approach surface use airspace as close as 17 feet from the ground. At this range, there is no doubt that the County's use of the clear zones as safety buffers is incompatible with defendants' desire to grow trees of substantial height on their properties.

Defendants also contend generally that the County failed to act under a claim of right. They argue that the County's communications to defendants Tomonto and Greenwich King Street Associates requesting permission to enter their properties to trim obstructive trees shows an implicit recognition of defendants' rights to the contested airspace. We disagree. "Use under a claim of right means 'without recognition of the rights of the owner of the servient tenement.'" Wadsworth Realty Co. v. Sundberg, 165 Conn. 457,

464 (1973).

Requesting permission to enter defendants' properties in order to top trees does not belie plaintiff's claim to have used the airspace under a claim of right. Asking permission to enter onto defendants' grounds is different than seeking permission to enter the airspace. The former simply implies concern for avoiding a potential charge of trespassing; the latter act by the County would be tantamount to recognizing defendants' right to the airspace, something the County has not done.

2. When The Bark Became Worse Than The Flight: The Temporal Easement Criteria

We turn to the temporal easement requirements. Defendants' primary contention is that no fifteen-year period exists during which time the

clear zones were devoid of trees. This argument presumably runs against both types of easements sought by the County. Since planes were never able to fly unobstructed through the clear zones for any fifteen-year period, defendants conclude that the airport is unable as a matter of law to establish the requirement of continuous, uninterrupted use for an avigation easement. For the same reason, defendants contend that no clearance easement was acquired since trees have always occupied the 20:1 clear zone.

Defendants are correct that some trees have occupied the 20:1 clear zone since the airport's early days. The question is, however, whether plaintiff must show full command over the FAA-defined clear zones in their entirety to establish a prescriptive

avigation to airspace above defendants' properties. We think not. The linchpin of the County's avigation easement claim is use of the glide path. If trees occupying the clear zones did not force aircraft to alter their approaches to runway 11/29, they have not defeated the County's uninterrupted use of its approach path.

Until the trees actually and substantially interfere with the County's enjoyment of its flight easement, defendants have done nothing actionable for which the County could seek to enforce its flight easement. See Kelly v. Ivle, 187 Conn. 31, 450 A.2d 817 (1982) (stating that an obstruction to an easement is abatable if it materially or substantially interferes with the reasonable enjoyment of the easement). In short, defendants'

trees must obstruct the glide path enough to interrupt its use by the County.

If trees did substantially obstruct the County's use of the 3-degree glide path and clear zones after the County had 15 years of uninterrupted, continuous use, it must be determined whether any of the defendants reacquired use of this airspace through their own prescriptive easements.

Usually, these questions of obstruction would be issues of fact to be resolved by the trier of fact. Here, however, both sides, referring to the series of NOAA charts and Donnelly surveys, argue that the material facts concerning tree growth in runway 11/29's clear zones cannot be disputed, although each draws contrary conclusions from the evidence. Defendants highlight evidence

that some trees existed within the 20:1 primary clear zone since 1949. The 1950 NOAA chart shows two, possibly three, trees penetrating the 20:1 clear zone along its outer edges on what appears to be the properties of King Street Associates and Tomonto.

On the 1964 NOAA chart, five trees are individually identified which appear to penetrate the 20:1 approach zone, three along its outer sides between approximately 400 and 1000 feet from the end of runway 11/29, and two nearer to the runway's centerline also standing approximately 500 and 1000 feet from the runway's threshold. See Defendants' Exhibits 1 and 2. The 1964 NOAA chart also shows wooded areas lying inside the 20:1 clear zone between 500 and 1500 feet from the runway.

By 1970, however, the NOAA chart

showed a wooded area extending across the width of the 20:1 clear zone. Russell Deposition at 274. This would have prevented approaching aircraft from using the airspace along the 20:1 approach surface. However, the 20:1 approach surface acts as a floor for the airspace available to approaching aircraft. As trees climb into the 20:1 clear zone, the cusion of airspace aircraft use for safety decreases. It is undisputed that trees have always existed inside the clear zones to some degree. This fact alone, however, does not undercut the County's avigation easement claim. Nothing shows that trees interrupted an aircraft's use of the 3-degree glide path or that any airplanes automatically adjusted their glide paths to steeper angles.

When trees initially began to crowd

the clear zones, some pilots chose to maintain their stabilized 3-degree glide path, flying nearer to the treetops instead of significantly altering their approach paths. See, e.g., Hughes Affidavit at 4. Since the mere existence of trees within the clear zones does not defeat the County's easement claim, the crucial question becomes when did the trees begin to significantly impair the County's ability to use runway 11/29. If the record indicates a dispute over this material question of fact, its resolution would have to await trial, and the summary judgment motions would be denied.

The record, however, does not demonstrate such a dispute. When the troublesome trees were fewer and more isolated, they posed no significant

problems for landing aircraft. Doak Affidavit at 9; Hughes Affidavit at 5-6; Lewis Affidavit at 6. During the earliest stages of tree growth in the clear zones, pilots during approach would add some power to momentarily level off the aircraft as they passed over the trees then resumed their descent at somewhat more than the 3-degree path. Doak Affidavit at 7; Watts Affidavit at 6.

Pilots have uniformly recounted that trees in the clear zones did not significantly obstruct the basic 3-degree approach which was practiced until the later 1970s or early 1980s, thirty or more years after the airport opened. See, e.g., Clemow Affidavit at 4; Hughes Affidavit at 6; Lewis Affidavit at 4; Watts Affidavit at 6. At this point, pilots resorted to

steeper approach paths to avoid the larger numbers of trees intruding into the 3-degree glide slope. See, e.g., Hughes Affidavit at 6; Lewis Affidavit at 5; Soliman Affidavit at 4; Watts Affidavit at 7. As one flight instructor put it when describing his teaching of approaches that sharply deviated from the normal 3-degree approach, "[p]articularly in the later 1970s, no simulation was necessary since Runway 29 provided the abnormal conditions called for because of the tree growth." Hughes Affidavit at 4.

The record regarding the County's use of the airspace over defendants' properties is largely undisputed. All the evidence offered suggests that, since the CWA's opening in the late 1940s, aircraft taking off and approaching runway 11/29 used a roughly

3-degree glide path. This use, unquestionably open and visible, was no less adverse and continuous for substantially more than 15 years. The progress of defendants' trees into the clear zones slowly forced aircraft to change their approach paths. Isolated trees penetrating the 20:1 clear zone between 1949 and 1964 caused pilots to make minor adjustments in their approach paths.

Defendants argue that the growing numbers of trees inside the clear zones between 1949 and 1970 defeat the County's claims of a fifteen-year period of uninterrupted use. As we noted earlier, this does not necessarily follow. The crucial issue is the exact point in time at which the trees began interfering with the County's use of this airspace, causing aircraft to

deviate from their normal 3-degree glide paths such that use would be considered interrupted. Plaintiff has offered undisputed evidence from pilot affidavits suggesting that this occurred at some time during the late 1970s. The NOAA charts and FAA correspondence offered by defendants do not themselves create a disputed issue of fact contradicting the pilots' statements.

The charts show scattered tree penetrations into the clear zones as early as 1949 which by 1970 formed a band extending across the width of the 20:1 clear zone, including certain trees reaching up to forty feet into the clear zones. Defendants infer from the charts that the trees interrupted the County's use of runway 11/29's approach path and clear zones by this time. On the record, the court, however, has no basis

on which to say this inference can be reasonably drawn for the approach path.

Trees clearly encroached upon the clear zones. However, this fact does not alone speak to the point in time when they interrupted the County's use of runway 11/29's glide path. Defendants have offered no evidence to show that County's use of the 3-degree glide path for runway 11/29, the prescriptive period for which expired by the mid-1960s, suffered anything more than small deviations due to trees before the late 1970s.

Defendants note the existence of a single tree, identified in a 1974 photograph, obstructing the 3-degree glide path for runway 11/29. This is not disputed by the pilots' affidavits. Pilots did not deny making minor adjustments in their glide paths for

tree growth prior to the late 1970s. What they stated unequivocally, however, was that the trees did not significantly interfere with their 3-degree approach until the late 1970s. Even inferring that a single tree standing in the glide path in 1974 substantially obstructed its use, the County's avigation easement would have matured some ten years earlier.

While the County has offered clear evidence showing that tree growth posed substantial obstacles by the late 1970s, defendants have proffered no evidence showing that the trees which were in the clear zones by 1970 caused anything more than slight changes in approach to runway 11/29. Showing that trees reached into the clear zones by a given number of feet does not necessarily show that they altered the glide path of

incoming or outgoing aircraft. The FAA warnings, prior to the early 1980s, noted penetrations into the clear zones. Again, however, this does not show whether aircraft were actually forced off their 3-degree glide path or not.

Without more, defendants have not placed the moment of substantial interference with flight operations, and hence the easement requirement of uninterrupted use, for runway 11/29 into dispute. We conclude that the County has demonstrated a fifteen-period of open, visible, uninterrupted, and adverse use, beginning sometime in the late 1940s when the runway first opened for use and expiring at latest during the mid-1960s, sufficient to establish an avigation easement for the approach path of runway 11/29.

3. The Genus of Flight Easement Acquired

Defendants suggest that any easement acquired by the County in an earlier age of flight would be based upon use significantly different from the use proposed today for runway 11/29, use which now includes jet aircraft. Under Connecticut law, "use" of a right-of-way easement "frequently involves the amount of traffic over the easement or alterations to the land to make it passable." Center Drive-In Theatre, Inc. v. Derby, 166 Conn. 460, 465 (1974).

Courts have found avigation easements lacking because the nature of the usage had changed so significantly that the easement proposed bore little resemblance to the easement previously acquired. In Petersen v. Port of

Seattle, 618 P.2d 67, the court, while recognizing the existence of avigation easements, determined that the easement acquired was by much smaller aircraft making far fewer flights. Id. at 71.

The facts here, however, suggest otherwise. Individuals associated with the operations of the CWA and pilots who have used runway 11/29 over the years state that the types of aircraft that used 11/29 in earlier periods, primarily lighter, small and medium-sized aircraft, are quite similar to those that used the runway in the 1970s, 1980s, and today in terms of rates of descent and flight characteristics. See, e.g., Clemow Affidavit at 2; Doak Affidavit at 2-5; Graber Affidavit at 6; Hornbech Affidavit at 3; Hughes Affidavit at 5; Lewis Affidavit at 3; Soliman Affidavit at 3; Watts Affidavit

at 3-4.

The County's easement is likewise unaffected by major changes in the volume of aircraft operations. The only evidence offered on this subject shows that airport operations have not differed dramatically since the 1960s, except to the extent that total operations, after peaking in the late 1960s, have apparently retreated back to the levels prevalent in the early 1960s.

Naturally, the number of daily flights using runway 11/29 varies with the day's weather conditions and volume of air traffic. Graber Affidavit at 4. However, CWA personnel noted that overall airport operations have remained relatively constant over the years, with runway 11/29 representing an estimated 40% of the CWA's operations. Id. Pilots have concurred, observing that runway

11/29's use has been relatively constant between the 1950s and 1970s. See, e.g., Watts Affidavit at 4.

When the wind conditions were appropriate, as many as 80 landings and takeoffs occurred daily on runway 11/29 from the 1950s through the 1970s. Id. One pilot stated that use of the runway dropped off slightly during the 1980s as interest in smaller private planes decreased. Id. However, airport personnel have said that use, although lower than in years past, remained constant from 1986 to the present. Russell Affidavit at 4.

This anecdotal evidence is supported by undisputed quantitative facts. In 1964, total airport operations numbered 202,129. They peaked in 1969 at 281,735 and dropped off to 255,232 by 1973. By the 1980s,

total flights had leveled off with 203,271 in 1980 and 202,885 in 1984. Graber Affidavit at 4. Based on this evidence, not contradicted by defendants, we must conclude that the volume of air traffic passing through runway 11/29's approach path remained basically steady between 1960 and 1984, though peaking somewhat in the late 1960s.

Thus, no evidence exists in the present record to support the notion that the avigation easement acquired by the County in the past would differ substantially from the easement desired by the County today. The nature of aircraft using runway 11/29, primarily smaller and lighter planes, has changed little over the years. There has been no showing that more than one approach path is used for runway 11/29.

The advent of jet aircraft, a notable shift in the character of planes using the CWA, does not alter our conclusion that the easement sought by the County today does not materially differ from the avigation easement earlier acquired. Any easement established by the County during the 1960s would have followed the blossoming of jet aircraft in the 1950s. Their use would be included within the County's easement.

Moreover, pilots have stated that today's jets are quieter than the earlier models using the WCA between 1960 and 1980. See Clemow at 2-3; Doak Affidavit at 5. Since current jet aircraft are less noisy than their predecessors, the avigation easement sought, less burdensome today on defendants than it had been in days

past, more closely resembles the original easement that was established.

Further, even if we assume that an easement for use of jet aircraft had not been originally established, such an evolution of the County's avigation easement would have been established by the early 1980s, once the 15-year prescriptive period had run. Consequently, we conclude that the County's avigation easement, acquired at the latest during the mid-1960s, is not markedly different from the easement proposed today.

4. Where The Easement Ends: Certainty of Boundaries

Defendants further argue that the court cannot recognize the acquisition of any easements by the County because its use has not established their boundaries with any reasonable

certainty. We conclude, however, that the avigation easement sought by the County has boundaries of reasonable degree of certainty.

The typical approach to runway 11/29 begins from the traffic pattern altitude of 1500 feet above the ground. On final approach, pilots seek to maintain a constant descent along a 3-degree glide slope. Doak Affidavit at 7; Soliman Affidavit at 5. It was not until the late 1970s or early 1980s that the trees forced aircraft to deviate from their approach path in any significant way. See Clemow Affidavit at 4; Lewis Affidavit at 4. The record shows that, until the late 1970s, nothing more than minor variations existed in the 3-degree glide path used by aircraft landing on runway 11/29. Any avigation easement acquired by the

County would have used airspace somewhere sitting on or slightly above a roughly 3-degree slope extending out from runway 11/29's threshold.

These parameters, with at most a few degrees of variation near the trees, are reasonably definite for purposes of defining the avigation easement associated with runway 11/29's use. Given the constant, and during the winter months often heavy, use of runway 11/29, anyone living beneath its approach path and gazing overhead at a passing plane would no doubt know with a reasonable degree of certainty the airspace a plane was using while approaching the threshold of the runway.

In sum, we conclude that the County has demonstrated its continuous, uninterrupted use for a fifteen-year period which began during the 1940s when

runway 11/29 first opened for use and expired, at the latest, some time before the mid-1960s.

E. From Zone to Zone, Guides Through The Boundless Sky Thy Certain Flight[12]: Clear Zones And Avigation Easements

By virtue of its acquisition of an avigation easement, the County also obtained the attendant rights of use necessary for its reasonable use and enjoyment. One of the rights incident to its avigation easement is a right to unobstructed clear zones. While avigation and clearance easements may involve distinct property rights, it seems clear that some sort of zone of

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[12]William Cullen Bryant, To a Waterfowl, which reads in part:

> He, who, from zone to zone,
> Guides through the boundless sky thy certain flight,
> In the long way that I must tread alone,
> Will lead my steps aright.

safety is absolutely essential for the safe use and enjoyment of the County's avigation easement. Lewis Affidavit at 6.

Under Connecticut Law, the "owner of an easement has all rights incident or necessary to its proper enjoyment." Kuras v. Kope, 205 Conn. 332, 533 A.2d 1202, 1206 (1987) (quoting Peterson v. Oxford, 189 Conn. 740, 745 (1983)); see also American Brass Co. v. Serra, 104 Conn. 139, 150 (1926). The court in Kuras recognized that use of an easement frequently involves alterations to the land to make the use possible. See Kuras, 533 A.2d at 1206 (citing Center Drive-In Theatre, Inc. v. Derby, 166 Conn. 160 (1974)). The Kuras test focuses on whether the desired acts are reasonably necessary to make effective the easement owner's enjoyment of that

easement unless the burden on the servient estate is unreasonably increased. See McCullough, 1992 Conn. Sup. LEXIS 240.

The holding in United States v. Brondum, 272 F.2d 642, does not necessarily conflict with our conclusion. The court in Brondum did not deny the interrelationship between avigation easements and clearance easements. It simply held that the government's condemnation of property for the express purpose of acquiring one easement does not result, by implication, in its acquisition of the other easement. Id. at 644-45. The message in Brondum is clear: when government exercises its power of eminent domain, it must clearly identify the property rights it seeks to acquire.

In this case, the County is

prevented from wielding its powers of eminent domain, the easement airspace being located in another state. Despite its somewhat unartful argument and inadequate briefing, it is apparent that the County is expressly seeking both avigation and clearance easements. Most importantly, Connecticut law recognizes that certain incidental rights essential for the use and enjoyment of an easement accrue to the easement's owner.

The presence of a buffer of airspace insures some margin of safety in an emergency. Wind turbulence, or wind shear, is particularly troublesome at low altitudes, in the severest conditions able to displace aircraft fifty feet in a few short seconds. Lewis Affidavit at 6. Clear zones are as unquestionably necessary to the safe operation of aircraft as shoulders are

for road safety or channels are for ships approaching harbors.

The clear zones that accompany a flight path are not unlike the shoulders that line all roads. Each secures a measure of added safety for those travelling, be it on highways on the ground or in the sky. Courts, assessing the width of the easement acquired extends beyond simply the beaten track actually used. Prescriptive highway easements are defined to be such widths as are necessary for their safe and convenient use. See, e.g., Grubb v. Teale, 265 Ala. 257, 262 (1956); Nikiel v. City of Buffalo, 165 N.Y.S.2d 592, 597 (N.Y. Sup. Ct. 1957); see also State ex rel. Game, Forestation & Parks Comm'n v. Hull, 168 Neb. 805, 97 N.W.2d 535, 550 (1959); Keidel v. Rask, 290 N.W.2d 255, 258-59 (N.D. 1980); Lindsay Land &

Live Stock Co. v. Churnos, 75 Utah 384, 285 P. 646 (1929); Yakima County v. Conrad, 36 Wash. 155, 66 P. 411, 412 (1901); see generally, 76 A.L.R.2d 535 §§ 5,8.

A New York court in Nikiel, in describing the width of a highway easement said:

> While the width and extent of a highway established by prescription or use are generally measured by the actual use for road purposes, the easement is not necessarily limited to the beaten path or traveled tract. It carries with it the usual width of the highway in the locality or such width as is reasonably necessary for the safety and convenience of the travelling public and for ordinary repairs and improvements. A highway established by user includes the traveled tract and whatever land is necessarily used or is incidental thereto for highway purposes.

Nikiel, 165 N.Y.S.2d at 597; see also Grubb, 265 Ala. at 262. Requiring highway easements to be of widths reasonably necessary for their safe and

convenient use in this respect parallels Connecticut law on the boundaries of prescriptive easements.

Recognizing the County's practical need for clear zones to reasonably enjoy its avigation easement will not unnecessarily burden the defendants. To some degree, permitting plaintiff to maintain a clear zone for aircraft using its runway will entail removing trees, or their tops at least, from defendants' properties. However, removal of the obstructing trees does not effectively or unreasonably preclude defendants from enjoying use of their properties.

Moreover, an easement is not invalid simply because it burdens the servient estate; all easements do this to some extent by definition. Use of an easement must be reasonable and should be as limited a burden on the servient

estate as the nature and purpose of the easement will allow. Kuras, 533 A.2d at 1206.

Overflights of defendants' properties will be significantly safer if planes have adequate clear zones, removing the need for pilots to use riskier techniques like "chop and drop" landings and steeper angles of descent.[13] The benefits of increased safety accrue not only to the passengers of aircraft but also to the property owners situated beneath the approach zone.

The topping of trees, perhaps upwards of one hundred or so, is

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[13]The term "chop and drop" refers to a landing technique used by pilots to clear obstructions in which the obstructions are cleared, power to the plane's engines is cut (the chop), and the plane loses altitude rapidly (the drop) until it lands on the runway. See Soliman Affidavit at 5-6.

obviously an unfortunate loss. Encouraging reforestation of the land enriches us all, adding to the quality of our lives and the aesthetic quality of our environment. One exception to this benefit is when those trees are situated adjacent to an airport's runway. One pilot, while overstating the point, highlighted this reality when he said, "Trees are beautiful but they can be killers to aircraft." Bennett Affidavit at 2. Runway 11/29's use predates the existence of many, perhaps even most, of these trees.

Defendants have made no showing that clearing the obstructing trees from the clear zones will undercut dramatically the respective uses of their properties as nursing home facilities, residences, a school, a road, and an investment

opportunity.[14] Moreover, substantial numbers of trees will remain untouched on defendants' properties partially screening the airport and contributing to the area's natural beauty.

In the final analysis, the rights of both holder of an easement and the owner of the servient estate are relative, each limited by the other's reasonable enjoyment. Kuras, 533 A.2d at 1207. Limiting the clear zones to the airspace reasonably necessary for the safe operation of aircraft using runway 11/29 insures that defendants will not be unfairly burdened by recognition of a clearance easement

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[14] Of course, the closing of the airport, which appears to be a devout wish of all of the CWA's neighbors, would improve the quality of life for those living nearby who must suffer the daily march of commerce overhead. And the continued growth of the trees could help accomplish that end.

incident to the County's avigation easement.

We note that at least one court has touched upon the interrelation between avigation and clearance easements, seemingly reaching a different conclusion. In Jefferson County v. Farris, 476 S.W.2d 457 (Tex. Civ. App. Beaumont 1972), the County attempted to condemn through its powers of eminent domain a "clear zone approach area," or clearance easement, for its airport. Local landowners sued the County in a separate action for damages, claiming that the County had committed a taking through its persistent low altitude flights over their property.

The court in Jefferson County refused to hold that the County, by constitutionally taking a clearance easement, had by definition also taken

an avigation easement. Citing U.S. v. Brondum, it rejected the notion that, for purposes of a taking, one easement necessarily includes the other. Quoting Brondum, the court held that the County, as condemnor, "ha[d] complete discretion in determining whether to take a clearance easement or to take an avigation easement." Id. at 459

For purposes of this case, Jefferson County is not determinative since the County of Westchester is seeking both an avigation and a clearance easement over defendants' properties. The court in Jefferson County was concerned with insuring that when government wishes to condemn private property through its power of eminent domain, it does not condemn expressly for certain uses and implicitly for other uses. In other

words, the state must be clear about nature of its condemnation.

We do not read the court's holding in Jefferson County to undermine the idea that, commensurate with establishment of a prescriptive avigation easement, a clear zone of some sort attaches by necessity, enabling aircraft to reasonably enjoy the avigation easement's use. To the extent it does imply this notion, we think that Connecticut law embraces a contrary view.

F. No Limits But the Sky?[15]: Boundaries of the Clear Zones

Having determined that an avigation easement was established by the County and that some clear zone attaches to this easement out of reasonable necessity, we must assess what the

[15]Miguel de Cervantes, Don Quixote de la Mancha, Pt. I, bk. III ch. 3.

boundaries are for the clear zones reasonably necessary for the County to enjoy use of its avigation easement.

Despite federalization of airspace, Congress expressly guarded the ability of landowners to pursue state law remedies for wrongs associated with the use of their property. The Federal Aviation Act of 1958, 49 U.S.C. §§ 1301 et. seq., provides that "[n]othing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute." 14 U.S.C. §1506. It is under the aegis of this provision that the County brought its claims for prescriptive easement and nuisance.

We have held that Connecticut easement law grants the County the clear zones reasonably necessary for the enjoyment and safe use of its avigation

easement. The key question that remains is what are the actual boundaries of a clear zone reasonably necessary under Connecticut law to safely exercise the County's avigation easement. If we follow the FAA's guidance, we would conclude that the clear zones necessary for safe operation of aircraft are those specifically identified in the FAA regulations as prerequisites for federal aid for airport projects.

The navigable airspace of the United States specifically includes "airspace needed to insure safety in take-off and landing of aircraft." 49 U.S.C. §1301(24). There is little doubt that clear zones fall within the category of airspace needed to insure safe flight operations, and thus are incorporated within the navigable airspace.

The Federal Aviation Act of 1958 invests the FAA with broad powers to foster air safety including the power to regulate the use of navigable airspace and prescribe air traffic regulations governing the flight of aircraft for the protection of persons and property on the ground. Flowers Mill v. United States, 23 Cl. Ct. 182, 185 (1991) (citing 49 U.S.C. §1348(c)). Pursuant to this statutory authority, the FAA promulgated Part 77 of the Federal Aviation Regulations concerning "Objects Affecting Navigable Airspace." See id. Courts have held that federal regulation of the navigable airspace is so extensive as to evidence an intent by Congress to preempt this field to insure uniformity in the interest of safety. See Allegheny Airlines, 132 F.Supp. at 881.

The FAA, however, does not possess the authority to prohibit or limit proposed construction it deems hazardous to air safety. Flowers Mill, 23 Cl. Ct. at 186, 188-89; see also Kupster Realty Corp. v. New York, 404 N.Y.S.2d 225 (1978). As a result, the federal government has not fully preempted a state's rights to regulate the navigable airspace. Id.

If a conflict exists between FAA regulations and Connecticut easement law over what airspace is reasonably necessary to insure safe air transportation, we must resolve which law governs our determination of the boundaries of the clear zones that attach to the County's avigation easement.

The specifications of clear zones--incorporated within the "airport

protection privileges" defined by Connecticut's aeronautics statutes[16]-- that are necessary for safe approaches to runways has received scant attention under Connecticut law. The term "clear zone" is defined by § 15-74(a) to mean "an area extending for up to one-half mile from the end of the runway on a public airport and designated by the commissioner of transportation as a

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[16]"Airport protection privileges" are defined under Connecticut law to mean "easements through or other interests in air space over land or water, interest in airport hazards outside the boundaries of airports...and other protection privileges the acquisition or control of which is necessary to insure safe approaches to the landing areas of airports ... and the safe and efficient operation thereof." Conn. Gen. Stat. § 15-34(9). Before condemning the property needed to insure safe approaches to airport landing areas, the Commissioner of Transportation must establish and publish standards which he has adopted that govern the determination of what property interests are necessary for safe aircraft operations. See Conn. Gen. Stat. § 15-73.

clear zone in accordance with regulations adopted by him." Conn. Gen. Stat. § 15-74(a).

Connecticut statutes represent only general statements about the importance of clear zones for safe air operations. The most detailed statement on clear zones is found among agency regulations regarding "approach standards" for commercial airports. The regulations state:

> The entire landing area shall be suitable for safe operations of aircraft under normal wind conditions. The landing area shall have approaches to all landing strips permitting a glide ratio of at least twenty to one and a transitional surface of at least seven to one.

Regs., Conn. Agencies § 15-41-31(d). Under this regulation's more general command to insure the safe operations on a particular landing area, only two specific approach zones are identified,

a 20:1 glide ratio and a 7:1 transitional surface.

No mention is made of the other surfaces defined by FAA regulations. Moreover, we are not certain whether "glide ratio" refers to the actual flight path to be used by aircraft while landing or the 20:1 clear zone in the FAA regulations. The Connecticut regulation concerning the 20:1 glide ratio is also silent as to the width of the approach zones it identifies. this could produce a dramatic difference in the boundaries of the clear zones, and thus in the number of trees occupying them.

Connecticut law requires municipalities receiving federal aid for airports to comply fully with federal laws and any rule or regulations governing receipt of such aid. See

Conn. Gen. Stat. § 13b-50 (1990). Thus, public airports in the state receiving federal airport aid must secure the various clear zones specified in the FAA regulations. This conformity with FAA regulations on clear zones, however, only applies to airports receiving federal funds, and merely orders these airports to comply with the rules the FAA says they must comply with in order to receive federal funds. It does not speak directly to the clear zones that connecticut deems reasonably necessary to guarantee the safe operations of aircraft, and none of the parties has offered any evidence of what clear zones Connecticut considers necessary for safe aircraft operations.

The commissioner of transportation is charged with the duty of formulating an airport approach plan for each

publicly-owned airport in the state. Among other things, the plan must detail any potential airport hazards and the measures needed to protect the airport's approaches. In creating a plan, the commissioner "may obtain and consider the views of the agency of the federal government charged with the fostering of civil aeronautics as to the aerial approaches necessary to safe flying operations at the airport." Conn. Gen. Stat. § 15-90.

Section 15-90's implications cut two ways. The fact that the Commissioner retains the discretion to designate clear zones smaller than FAA standards undercuts the idea that the FAA regulations preempt a state's ability to define its own clear zones. However, the Commissioner, while not compelled to follow FAA guidelines in

formulating the airport approach plan, is certainly directed to consider the FAA's guidance on what clear zones are necessary for safe airport operations.

While it is by no means clear from its laws and regulations, we conclude that Connecticut would follow the FAA's determination as to the clear zones reasonably necessary for the safe operation of aircraft. It may be that Connecticut regulations exactly mirror the FAA-defined clear zones, but simply use a different term to identify the 20:1 clear zone.

At the very least, the FAA-defined clear zones are binding on all airports in Connecticut that participate in the airport aid program and provide guidance for approach plans for all public airports in the state. We find that, while not generally bound to enforce the

FAA clear zones or defer to the FAA's institutional expertise in the area of air safety, Connecticut would agree that the clear zones necessary for safe air operations are those identified in the FAA regulations.

G. Out of Acorns, Do Mighty Easements Grow?: Defendants' Counter-Easements

Our finding that the County has established a prescriptive avigation easement to the airspace above defendants' properties does not end our inquiry. Defendants claim that even if the County acquired such an easement in years past, it no longer retains any rights of use in this airspace because the trees occupation of the clear zones has reestablished their rights to the airspace by reverse prescription.

In assessing the arguments regarding the counter-easement claims,

we must be clear as to the prescriptive easement acquired by the County and the counter-easements sought by defendants. We have held that the County has prescriptively acquired, as a matter of law, an avigation easement for its use of the 3-degree glide path connected to runway 11/29. The defendants' counter-easement claim seems to represent a claim to two distinct but related bodies of airspace, the airspace for the County's avigation easement and the airspace constituting the clear zones. We shall examine the defendants' claim to each zone of airspace individually.

The criteria for determining whether any defendant has reacquired rights to the airspace are identical to those the County met in establishing its easements initially. Each defendant

must show open, visible, adverse, continuous use for a 15-year period. Klar Crest Realty, 190 Conn. 163.

As against the County's avigation easement, the trees' use of the airspace ripens into adverse use only after they begin to substantially interfere with the County's use of its glide path. See Kelly v. Ivler, 187 Conn. 31, 450 A.2d 817; see also Kitzinger v. Gulf Power Co., 432 So.2d. 188 (Fla. Dist. Ct. App. 1st Dist. 1983).

Kitzinger involved a power company's easement allowing it to string electrical lines across a property. The power company sought an injunction to force the removal of the Kitzinger's house because it encroached into the safety zone that would parallel certain power lines once they were hung. The court in Kitzinger stated that:

> Since the servient tenant, as long as he does not interfere with the right of user, may use his land in any manner he desires, an act which serves to start the prescriptive period in his favor must be one clearly wrongful as to the owner of the easement. This requires that the use of the land by the servient tenant must be one which is incompatible or irreconcilable with the authorized right of use. Thus, the erection of permanent structures ... or other obstructions seriously interfering with the right of use, are sufficient to extinguish the rights.

Id. at 191 (quoting 3 Powell, The Law of Real property ¶ 424 (1981)). Thus, defendants trees are not adverse to the County's avigation easement until their obstruction of the clear zones is clearly inconsistent with the County's use of the airspace. Id.

Defendants' easement claim to the clear zones airspace becomes adverse immediately once a tree grown into a given portion of the clear zone. Once a tree occupies a particular part of a

clear zone, that airspace no longer serves as a safety buffer for aircraft. This adverse use, however, exists only for the airspace actually occupied by the trees.

As we noted earlier, the record indicates that the trees grew into serious obstructions in the late 1970s or early 1980s. The 15-year prescriptive period for defendants' reverse easement claim to the glide path airspace begins at some point during these years. While we cannot identify the exact year when this occurred, it matters little for our analysis. Even assuming that the trees substantially encroached upon the clear zones by the later 1970s, defendants' reverse easement claim was uprooted when the County's (sic) commenced its action in 1990, before the required fifteen-year prescriptive period had

expired.

Further, the Kitzinger court noted that a clearer showing of adversity is required to extinguish an easement than to create one by prescription. See id. at 192. This heightened burden on defendants to show the point in time when their trees materially impaired the ability of aircraft to use runway 11/29's approach path would only underscore our holding. The affidavit testimony of various pilots represents the only evidence directly addressing when the trees became a serious obstacle to use of the 3-degree glide path. None of the pilots indicated that before the late 1970s the trees caused anything more than minor adjustments to the approach to runway 11/29/ Thus, defendants' prescriptive easement claim to the glide path's airspace must fail.

The Kitzinger court recognized the power company's right to remove obstructions to its easement, including encroachments upon the safety zones surrounding power lines. However, it refused to order removal of the house since it represented only a theoretical interference with power lines not yet constructed, i.e. not yet a clear and present interference. See Kitzinger, 432 So.2d. at 193.

Defendants trees, however, stand on vastly different ground. They are unquestionably a clear and present interference with the County's use of runway 11/29's approach path. There are over one hundred trees penetrating the 20:1 and 7:1 clear zones, and they have already reduced runway 11/29's usable tarmac by over 1000 feet. They no doubt stand as a clear and present

interference.

Connecticut law obliges the owner of the servient estate--here the defendant landowners--"to refrain from doing or suffering something to be done which results in an impairment of" the easement owner. Kelly v. Ivler, 450 A.2d at 823 (quoting Carrig v. Andrews, 127 Conn. 403, 407-08 (1941)).

Kelly v. Ivler involved an action to compel the removal of a fence erected by a property owner that allegedly encroached upon the plaintiff's easement. The court, noting an earlier decision, stated that an obstruction "erected within the boundaries of an easement so as to constitute a nuisance, was abatable 'if it materially interfered with [the] reasonable enjoyment of the easement, or rendered that enjoyment less beneficial or

convenient than before its erection.'" Id. at 824 (quoting Blanchard v. Maxson, 84 Conn. 429, 436 (1911)).

If the servient tenant's use has not reached the point of materially interfering with the use of the easement, the adversity requirement for prescriptive easements has not been met, and the 15 year prescriptive period has not yet commenced. There is no basis to infer that the single tree identified by defendants as interfering with the glide path in 1974 seriously interfered with aircraft approaches. Pilots testified that brief adjustments were necessary, causing no more than small increases in the angle of the glide path. Nothing indicates that one tree was incompatible with the County's basic approach to runway 11/29. Hence, defendants' claim of a counter-easement to the glide path

airspace fails to meet the requirement of adversity for a 15 year period.

Their claim to the clear zones' airspace, however, stands on a different footing. For this aspect of their claim, occupation of airspace immediately satisfies Connecticut's prescriptive easement requirements. A tree that has reached airspace inside a clear zone is indisputably open and visible. Further, unless it is later cut, that tree's occupation will be continuous and uninterrupted. And such a tree is unquestionably adverse; its mere existence in the airspace destroys the County's ability to use the empty airspace as a safety buffer.

Defendants' easement claims, however, can succeed only to the extent that the trees occupied the clear zones for the required 15 year prescriptive

period. The County commenced suit in February 1990. Therefore, defendants can acquire prescriptive easements for those trees (and any other obstructive objects) that occupied the clear zones before February 1975. Since the other easement criteria have been met, the trees (and other objects) occupying runway 11/29's clear zones have acquired a prescriptive easement, as a matter of law, over the airspace they occupied as of February 1975, fifteen years before the County filed suit.

This raises a difficult problem for the defendants, and one most likely impossible to answer with any exactness. To establish an easement to the clear zone airspace under Connecticut law, the boundaries of that easement must be defined with a reasonable degree of certainty.

Defendants reacquiring, or reaffirming, their right to the clear zone airspace to the extent it was occupied by their trees in February 1975 does not say what height each tree attained by that date. This is a factual issue that is impossible to resolve since no NOAA charts or any other evidence exists to fully establish the heights of the trees in February 1975.

A photogrammatic analysis completed by defendant the Convent of the Sacred Heart includes some evidence of tree heights from a 1974 photograph. This survey identifies the heights of six trees as of 1974, although its margin of error is 12 feet and identification of two individual trees was uncertain. From this incomplete information, we cannot determine the tree heights in 1974 with any certainty nor the degree

of encroachment into the clear zones at this point. The only other solution we can propose is to recognize the defendants' easements for the tree heights as of 1970, the date of the NOAA chart nearest in time to 1975.

H. Hurt Not The Trees[17]: Laches

Finally, defendants claim that the County is barred by the doctrine of laches from bringing an action to establish a prescriptive easement to their airspace. They argue that the FAA's repeated warnings about the severity of the tree obstructions to runway 11/29 prevent the County from first asserting its legal rights in 1990. According to defendants, the County was put on notice of the tree

[17]The Revelation of St. John the Devine, 7:3, which says, "Hurt not the earth, neither the sea, nor the trees."

problem in 1969 and resisted urgent warnings by the FAA for some 15 years. Defendants contend that they should not be allowed to pursue legal action at this late date.

To make out a claim for laches under Connecticut law, defendants must meet two criteria: inexcusable delay in asserting a claim and prejudice to the defendants from this delay. Haggarty v. Parniewski, 11 Conn. App. 37 (1987). A period of delay starts when the plaintiff knew or should have been aware of the wrong on which it later commenced suit. I-291 Why? Ass'n v. Burns, 372 F.Supp. 223 (D.Conn. 1974), aff'd, 517 F.2d 1077 (2d Cir. 1975).

Defendants contend that the County was on notice as early as 1949 when the first NOAA obstruction chart was compiled revealing trees inside runway

11/29's 20:1 clear zone. The CWA received NOAA charts in 1963, 1970, 1981, and 1990, all showing tree obstructions in the clear zones. By 1979, the CWA possessed actual knowledge of the problem when it was prevented from installing a visual approach slope indicator ("VASI") system for runway 11/29 by interference of trees with the system's 3-degree slope.

Beginning in 1981 and continuing until the FAA ordered the displacement of the runway in 1988, the CWA received direct and repeated warnings from the FAA about the problem of tree obstructions in runway 11/29's clear zones. In 1981, the FAA recommended removal or topping of the offensive trees. See Defendants' Exhibit 14. In 1984, the FAA again raised concerns about tree encroachments. In response,

the CWA issued a NOTAM advising pilots of tree obstructions and suggested steeper approaches to insure aircraft safety. Despite repeated FAA requests between 1984 and 1988 and directions to formulate a plan of action to remove the obstructions, the CWA delayed action.

Plaintiff's responds that the actual height of the trees is difficult to discern from the air and tree growth into the clear zones was a slow process, imperceptible to an observer. The County's argument, the legal equivalent of "I cannot see the forest for the trees" is both weak and unconvincing. The FAA specifically and repeatedly warned the County about tree obstructions. The County issued a NOTAM in 1984, nearly six years before it finally commenced suit.

The record is replete with evidence

showing that the County was told of tree obstructions as early as 1969, and possessed actual knowledge by the 1979, at the latest. Through the 1980s, the County callously ignored express FAA warnings that the trees represented a hazard to navigation. We have little doubt that nine years of inaction, even stonewalling, after clear warnings by the FAA constituted inexcusable delay on the part of the County. However, we note two things. First, the FAA, a federal agency, did not seem to appreciate the limited power that a County has over property owners who are located outside the county, and indeed located in a different state. Second, we find no undue prejudice to any of the defendants from the County's delay.

Defendant Convent of the Sacred Heart states that during this period it

completed a costly expansion of the Convent's facilities, including the addition of a new gymnasium. The tenor of the Convent's argument is that granting the County an easement will devastate its academic environment and result in the harsh removal of its estate trees, flag pole, and building chimneys. Greenwich King Street Associates contends that it purchased its property in 1986, and thus the County's delay, and the tree removals, will severly undermined (sic) the value of its investment.

On balance we cannot say that defendants have been unfairly prejudiced. Years of County inaction allowed the trees to grow further into the clear zones. Defendants enjoyed the benefit of continued and increased screening from the airport during this

time. Had the County commenced this action any earlier, defendants' legal and equitable positions would have been weaker. The partial easement to the clear zones established by defendants before February 1975 would have been far smaller had the County commenced this action any earlier. Greenwich King Street Associates has not lost the investment potential of its property. Nothing in the record demonstrates a significant loss in the value of the real estate. Moreover, it was fully aware, or should have been, when it purchased the land that it abutted the CWA, and runway 11/29 specifically.

Despite the accumulated fears of the defendant landowners, recognizing the County's prescriptive avigation easement after years of delay will not produce the dire mixture of results they

envision. The County gains use of the flight path it utilized until the late 1970s when the trees became a significant problem. The obstructions that existed on the defendants' properties (including the Convent's chimneys and flag pole) when this easement was established can remain at the heights they had achieved before 1975. Nothing prevents new construction or growth of foliage provided they do not exceed the height ceiling established when the avigation easement was established. At present, defendants are not unduly prejudiced and their laches defense accordingly fails.

I. Who's Gonna Move the Trees"[18]: Relief

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[18]S. Silverstein, "Hammock," A Light in the Attic, which reads:

> Grandma sent the hammock,
> The good Lord sent the breeze.
> I'm here to do the swinging--
> Now, who's gonna move the trees?

Since defendants' trees now materially and substantially interfere with the County's use of its avigation easement, the County can seek to trim the offensive trees.[19] In Connecticut, "injunction is the proper remedy to stop interference with an owner's use and enjoyment of an easement." Peckheiser v. Tarone, 186 Conn. 53, 60-61 (1982). Trimming trees occupying the clear zones does not follow the County's establishment of an avigation easement as a matter of right. However, it is generally granted unless removal would produce a severe hardship upon the defendants. See Di

[19]Given our decision regarding the County's acquisition of prescriptive avigation and clearance easements to the clear zones and approach path to runway 11/29 and our rejection of defendants' reverse easement claim, we need not reach plaintiff's claims of public nuisance or equitable servitude.

Sorbo v. Grand Associates One Ltd. Partnership, 8 Conn. App. 203 (1986). Defendants argue that trimming will destroy some of the trees. We acknowledge that possibility.

Despite the possible loss of trees on defendants lands that cannot be trimmed, we cannot say that the balance of equities tips in their favor. Many trees will remain on these properties, including those trees that occupied the clear zones by February 1975. A refusal to enjoin the further tree growth into runway 11/29's clear zones is likely to eventually shut down the runway's use entirely. This would place an extraordinary burden on the CWA to meet its air traffic demands and would surely raise the risks of loss to life and property to dangerous levels, particularly when weather conditions

deteriorate.

The County's ability to cut back the offending trees is tempered by the counter-easement established by defendants to use of the airspace actually occupied by February 1975. The County is entitled to clear runway 11/29's clear zones to their condition as of February 1975. We recognize that this result leaves the County with something less than what it desired, unobstructed clear zones of FAA-defined dimensions. The County may have to permanently suffer the use of runway 11/29 with a partially displaced threshold. For this, the County has only itself to blame. Had it acted on the FAA warnings sooner, it would have cut off the defendants' counter-easement claims at a much earlier date, and preserved a larger portion of runway

11/29's clear zones.

To conclude, we find that the wisest and safest course is to grant the County a limited injunction to cut back, at its own expense, the trees occupying runway 11/29's clear zones to the heights they attained as of February 1975. To the extent, certain trees cannot be simply trimmed back without destroying them, the County shall be permitted to remove them completely but must compensate defendants for their loss. As a result, plaintiff's and the defendants' motions for summary judgment are granted in part and denied in part.

The final question, and the one perhaps most vital to all the parties, is precisely which trees should be removed or topped by the County. This is a difficult question, and one for which this court is ill-equipped to

answer on the present record. No adequate judicial mechanism exist for determining which trees should be trimmed and the amount of trimming required as well as which trees must be cut down. Therefore, we shall appoint a special master to evaluate the evidence concerning the defendants' properties and submit a recommendation on precisely which trees should be topped and which trees require removal.

SO ORDERED.

Dated: White Plains, New York
June 2, 1992

s/
GERARD L. GOETTEL
U.S.D.J.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City and County of New York, on the 6th day of January, one thousand nine hundred and ninety-three.

Before:

HONORABLE WILFRED FEINBERG,
HONORABLE AMALYA L. KEARSE,
Circuit Judges.
HONORABLE ROBERT F. PECKHAM,*
District Judge.

SDNY
90-cv-1302
G. Goettel

---X

COUNTY OF WESTCHESTER,
NEW YORK,
Plaintiff-Appellee,

- against -

92-7698
92-7700
92-7704
92-7706
92-7726

COMMISSIONER OF TRANSPORTATION OF THE STATE OF CONNECTICUT,
Defendant,
TOWN OF GREENWICH; LAURELTON NURSING HOME, INC.; GREENWICH KING STREET ASSOCIATES II, L.P.; MILDRED TOMONTO; THE CONVENT OF THE SACRED HEART,
Defendants-Appellants,
LAURELTON CONVALESCENT HOME, INC.
Appellant.

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*Honorable Robert F. Peckham, Senior United States District Judge for the Northern District of California, sitting by designation.

ORDER

On consideration of the briefs and record (including the amicus curiae brief of the Attorney General of the State of Connecticut, requesting the certification ordered herewith) and the oral argument in this appeal, it is hereby ORDERED that the Clerk of the Court transmit to the Clerk of the Connecticut Supreme Court a Certificate in the form attached, together with a complete set of the briefs, appendix and record filed by the parties with this court. The parties are hereby ordered to bear the cost equally of such fees and costs, if any, as may be requested by the Connecticut Supreme Court.

s/
WILFRED FEINBERG,
s/
AMALYA L. KEARSE
Circuit Judges.
s/
ROBERT F. PECKHAM,
District Judge.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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COUNTY OF WESTCHESTER,
NEW YORK,
Plaintiff-Appellee,

- against -

92-7698
COMMISSIONER OF 92-7700
TRANSPORTATION OF THE 92-7704
STATE OF CONNECTICUT, 92-7706
Defendant, 92-7726

TOWN OF GREENWICH; LAURELTON
NURSING HOME, INC.; GREENWICH KING
STREET ASSOCIATES II, L.P.;
MILDRED TOMONTO; THE CONVENT
OF THE SACRED HEART,
Defendants-Appellants,

LAURELTON CONVALESCENT HOME, INC.
Appellant.
----------X

Certificate
to
The Connecticut Supreme Court
(pursuant to Conn. Gen. Stat. § 51-199a-
Uniform Certification of Questions of
Law Act)

The Westchester County Airport (the airport), owned and operated by the County of Westchester (the County), is located in New York adjacent to the

border between New York and Connecticut and has been in operation for more than 40 years. The airport presently uses two runways. One of these runways, runway 11/29 (the runway), abuts New York's border with Connecticut. The approach zone to the runway is located almost entirely in Connecticut. The tree-studded land underneath the approach zone is owned by the defendant landowners (landowners). One of the landowners, the Town of Greenwich, is a public entity. The rest are private persons or entities.

The Federal Aviation Administration (FAA) requires the airport, like all airports, to keep the approach zone free of obstructions. Over the years, however, several of the landowners' trees have penetrated into the airspace constituting the approach zone. The FAA

voiced concern about the trees in 1981, warning that unless they were removed the threshold (the end of the runway) would have to be shortened so that aircraft would not risk hitting the encroaching trees when landing or taking off. Eventually, the FAA ordered the runway's threshold displaced. Completed in 1989, the displacement shortened the runway's usable length by some 1300 feet.

The airport offered to trim the trees back at the County's expense, but the landowners refused. In February 1990, the airport filed this action in the United States District Court for the Southern District of New York. All parties agreed that "New York cannot exercise its powers of eminent domain over property located in another state." 745 F. Supp. 951, 953. Consequently, the airport advanced

several theories based on Connecticut state law, principally that the airport had acquired a prescriptive easement entitling it to use and maintain the airspace it needed to keep the runway fully operational.

The parties filed motions for summary judgment, and the district court, Gerard L. Goettel, J., issued an opinion on June 2, 1992. 793 F. Supp. 1195. As an initial matter, the district court's analysis divided the airport's claimed easement into two distance easements; namely, "an avigation or flight easement giving [the airport] a right to fly through the airspace above the [landowners'] properties" and a "clearance easement providing [the airport] the right to cut down those trees obstructing the approach to runway 11/29 and its clear

zones." Id. at 1204.

As the district court recognized, the status of these easements is uncertain under Connecticut law. Nonetheless, the district court was "persuaded that recognition of a prescriptive avigation easement is the proper course" and "that clearance easements . . . [also] can be acquired by prescription." Id. at 1205, 1207. Having established the availability of avigation and clearance easements, the district court next found that the airport had in fact satisfied all the requirements necessary to acquire those easements. According to the district court, one of the rights incident to the airport's avigation easement was a right to unobstructed "clear zones." Id. at 1213. A clear zone consists of a buffer of airspace surrounding the approach

path to the runway and acts to safeguard the clear passage of arriving and departing aircraft. The district court reasoned that the dimensions of this zone were coextensive with those established by FAA regulations. Id. at 1217.

The airport's victory was not complete, however. The district court also found that the landowners had acquired prescriptive counter-easements by the growth of their trees into the clear zone, though the court rejected the landowners' claim of counter-easement into account, the court offset the extent of the airport's easement by the landowner's counter-easement. Id. at 1219.[1]

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[1]According to the district court, the landowners' trees became adverse to the airport's prescriptive right in the clear zone the moment they penetrated

Finally, the district court rejected the landowners' laches defense.

After the landowners filed notices of appeal, they petitioned the district court to amend its June 2, 1992 opinion to include a certification pursuant to 28 U.S.C. §1292(b). The district court granted the motion, stating that its June 2 opinion "involve[d] a controlling question of law as to which there is a substantial ground for difference of opinion." The district court formulated the question as follows: "[W]hether the state of Connecticut recognizes avigation easements acquired by

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that zone. Using a 15-year prescriptive period under Connecticut law, the district court reasoned that by filing suit in February 1990 the airport effectively limited the extent of the landowners' prescriptive counter-easement to the airspace the trees occupied as of February 1975. Id. at 1219.

prescription and, if so, whether it would include a clearance easement and what its dimensions would be." The landowners petitioned for permission to appeal pursuant to § 1292(b). We granted the petition and accepted the appeal on the basis of § 1292(b).

We are aware that the district court spend considerable time and energy carefully analyzing the novel and complex issues this case presents, and that the parties wish this controversy to come to a close, each side believing it has the stronger case on the merits. Nevertheless, the Attorney General of Connecticut, appearing before us as amicus curiae on behalf of the State of Connecticut, correctly observes that this case involves unsettled and significant questions of Connecticut property law. The Attorney General

therefore asks that we certify the relevant questions to the Connecticut Supreme Court. We think this is prudent counsel.

The questions of law that should be decided by the Connecticut Supreme Court are as follows:

1. Can an avigation easement be acquired by prescription in the State of Connecticut?

2. If under Connecticut law a clearance easement is distinct from an avigation easement, can a clearance easement be acquired by prescription in the State of Connecticut?

3. Whether conceived as incident to an avigation easement or as constituting a separate clearance easement, would a clear zone include whatever air space is necessary to use the easement?

These difficult questions implicate

the authority of the State of Connecticut to declare whether a particular set of property rights will be recognized within the state. These are questions of first impression under Connecticut law. Indeed, there appears to be little law anywhere directly addressing the particular rights at issue here. The district court cited only three cases involving prescriptive avigation easements, and these indicate that no single position has commanded universal assent. Compare Petersen v. Port of Seattle, 618 P.2d 67, 70-71 (Wash. 1980) (in banc) (implicitly acknowledging prescriptive avigation easement); Drennen v. County of Ventura, 112 Cal. Rptr. 907, 909 n.2 (Ct. App. 1974) (seeing "no reason why an avigation easement may not be acquired by prescription" but "not decid[ing] the

point") with Sticklen v. Kittle, 287 S.E.2d 148, 155 (W. Va. 1981) (refusing to recognizing prescriptive avigation easement).

There appear to be no controlling precedents in Connecticut on the issues presented here. These issues affect the property interests of Connecticut residents. The Connecticut Supreme Court is in a better position than are the federal courts to adjudicate these issues of Connecticut law. Certification respects Connecticut's strong interest in deciding the above questions "rather than having the only precedent on point be that of a federal court, which may be mistaken." Home Ins. Co. v. American Home prods. Corp., 873 F.2d 520, 522 (2d Cir. 1989). Resolution by the Connecticut Supreme Court of the certified issues would aid

in the administration of justice.

The foregoing is hereby certified to the Supreme Court of Connecticut pursuant to Conn. Gen. Stat. § 51-199a as ordered by the United States Court of Appeals for the Second Circuit.

s/
Elaine B. Goldsmith, Clerk
United States Court of Appeals
for the Second Circuit

Dated: New York, NY
January , 1993

SUPREME COURT
April/May Term, 1993

COUNTY OF WESTCHESTER, NEW YORK v. TOWN OF GREENWICH ET AL.

(14710)

Peters, C.J., Callahan, Borden, Katz and Palmer, Js.

Argued April 27 -- decision released July 28, 1993

Action for, inter alia, an injunction prohibiting the defendants from encroaching upon and obstructing the approach zone to a certain runway of a municipal airport owned and operated by the plaintiff, and for other relief, brought to the United States District Court for the Southern District of New

York, where the court, Goettel, J., dismissed the action against the named defendant and granted in part the remaining defendants' motion to dismiss certain of the counts against them and where the remaining defendants filed a counterclaim; thereafter, the court granted in part the plaintiff's motion to dismiss the counterclaim; subsequently, the court granted in part both the plaintiff's and the remaining defendants' motions for summary judgment determining that the plaintiff had acquired a prescriptive easement to fly over the remaining defendants' property and ordering certain other relief, and the remaining defendants appealed to the United States Court of Appeals for the Second Circuit, which certified to this court the applicable questions of law.

Karl S. Coplan, pro hac vice, with

whom were John M. Callagy, pro hac vice, Elizabeth Tyler Grove, Stuart A. McKeever and, on the brief, Edward V. O'Hanlon, John E. Meerbergen, Joyce H. Young, Eve C. Gartner, pro hac vice, William Schwartz, pro hac vice, Chase Rogers and Rosalind Kelley, for the appellants (defendant town of Greenwich et al.).

Marguerite R. Wiess, pro hac vice, with whom were Russell J. Tenenzapf, pro hac vice, and, on the brief, Carol L. Van Scoyoc, pro hac vice, and Marilyn J. Slaatten, pro hac vice, for the appellee (plaintiff).

Karen P. Blado, J.E. Murdock III, Leonard A. Ceruzzi, pro hac vice, and Janet V. Lanigan, pro hac vice, filed a brief for the National Business Aircraft Association and the Westchester Aviation Association as amici curiae.

William E. Hegarty and John B. Conway, pro hac vice, filed a brief as amici curiae.

Richard Blumenthal, attorney general, and Cornelius F. Tuohy, assistant attorney general, filed a brief for the state of Connecticut as amicus curiae.

John S. Yodice, Ronald D. Golden and Raymond C. Speciale, pro hac vice, filed a brief for the Aircraft Owners and Pilots Association as amicus curiae.

PALMER, J. The dispositive question is whether the plaintiff, the county of Westchester of the state of New York, has acquired an air navigation (avigation) easement[1] by prescription

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1 "An avigation easement is an easement of right to navigation in airspace over designated land." Sticklen v. Kittle, 168 W.Va. 147, 155, 287 S.E.2d 148 (1981).

over certain Connecticut property under the laws of this state. This and other questions[2] come to this court upon our grant of certification from the United States Court of Appeals for the Second Circuit pursuant to General Statutes § 51-199a and Practice Book § 4168.[3]

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[2] The Court of Appeals certified the following questions to this court:

"1. Can an avigation easement be acquired by prescription in the State of Connecticut;

"2. If under Connecticut law a clearance easement is distinct from an avigation easement, can a clearance easement be acquired by prescription in the State of Connecticut; and

"3. Whether conceived as incident to an avigation easement or as constituting a separate clearance easement, would a clear zone include whatever air space is necessary to use the easement." County of Westchester v. Town of Greenwich et al., No. 92-7698(L) CQL 93-001, January 6, 1993.

[3] General Statutes § 51-199a provides in relevant part:

"(a) This section may be cited as the Uniform Certification of Questions of Law Act.

"(b) The supreme court may answer questions of law certified to it by. . .

County of Westchester v. Town of Greenwich et al., No. 92-7698(L) CQL 93-001, January 6, 1993. We conclude that, in the circumstances of this case, the plaintiff has not acquired an

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a court of appeals of the United States . . . when requested by the certifying court if there are involved in any proceeding before it questions the law of this state which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of the supreme court of this state.

"(c) This section may be invoked by an order of [the court of appeals of the United States] upon the court's own motion or upon the motion of any party to the cause.

"(d) A certification order shall set forth: (1) The questions of law tc be answered; and (2) a statement of all facts relevant to the questions certified and showing fully the nature of the controversy in which the questions arose."

"[Practice Book] § 4168 [CERTIFIED QUESTIONS FROM FEDERAL COURTS] - IN GENERAL The supreme court may answer questions of law certified to it by the supreme court of the United States, a court of appeals of the United States or a United States district court when

avigation easement by prescription.[4]

The record certified by the Second Circuit provides the following facts.[5] (Id., 1-4) The plaintiff is a New York municipal corporation that owns and operates the Westchester County Airport (the airport). The airport is located in New York adjacent to the border between New York and Connecticut. The airport currently utilizes two runways. Runway 11/29 (the runway) is an alternative runway that is normally used only if prevailing

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requested by the certifying court if there are involved in any proceeding before it questions of law of this state which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of the supreme court of this state."

[4] Our resolution of this issue makes it unnecessary for us to decide the second and third certified questions.

[5] See Practice Book § 4065 (c).

crosswinds make use of the main runway too dangerous for all but the largest aircraft or during an emergency. The runway abuts New York's border with Connecticut and its air approach zone is located almost entirely above Connecticut. The defendants[6] are Connecticut residents who own the land below the approach zone. Trees on their land have, over time, grown into that airspace.

Buffers of airspace known as clear zones surround the actual flight paths used by aircraft during take-offs and landings. The Federal Aviation Administration (FAA) requires that these

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[6] The defendants originally included: the commissioner of transportation of the state of Connecticut; the town of Greenwich; Laurelton Nursing Home, Inc.; Greenwich King Street Associates II, L.P.; Mildred Tomonto; and The Convent of the Sacred Heart. See footnote 8.

clear zones be kept free of obstructions so that aircraft may navigate safely during take-offs and landings. In 1989, due to penetration into the clear zone by certain of the defendants' growing trees, the FAA, in effect, reduced the usable length of the runway by approximately 1350 feet.

As a consequence, in February, 1990, the plaintiff initiated an action for injunctive and declaratory relief in the United States District Court for the Southern District of New York claiming, inter alia, that the defendants' trees interfered with the use of the runway. County of Westchester v. Town of Greenwich, Conn., 745 F. Sup. 951, 957 (S.D.N.Y. 1990).[7] The plaintiff claimed in the District Court that

[7] The District Court also noted "[the County's] additional motivation behind

Court that "the use of the airspace for approximately forty years had given [it] a prescriptive easement in the flight zone"; id., 953-54; and sought an injunction authorizing it to top or cut down, as necessary, trees that had penetrated into that zone and had thereby interfered with the plaintiff's

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the . . . present litigation. The County has planned to expand the airport by adding an additional runway and a new terminal. To be eligible for federal grants for airport development projects under the federal-aid Airport Program, the County must own, acquire, or agree to acquire control over, or a property interest in, runway clear zones that the Administrator considers adequate . . . . . An airport possesses a sufficient property interest if it has an easement . . . giving it enough control to rid the clear zone of all obstructions . . . and to prevent the creation of future obstructions; together with the right of entrance and exit for those purposes, to ensure the safe and unrestricted passage of aircraft in and over the area." (Internal citations and quotation marks omitted.) County of Westchester v. Town of Greenwich, Conn., 793 F. Sup. 1195, 1203 n.4 (S.D.N.Y. 1992).

claimed easement.[8] Both the plaintiff and the defendants subsequently filed motions for summary judgment. County of Westchester v. Town of Greenwich, Conn., 793 F. Sup. 1195 (S.D.N.Y. 1992). The District Court, acknowledging that the courts of this state had never determined whether avigation and clearance easements [9] may be acquired

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[8] The District Court subsequently dismissed the plaintiff's Connecticut state law cause of action against the commissioner of transportation, concluding that the eleventh amendment to the United States constitution prohibited such a suit. County of Westchester v. Town of Greenwich, Conn., 745 F. Sup. 951, 957 (S.D.N.Y. 1990).

[9] The District Court separated the plaintiff's claimed right to remove certain of the defendants' trees from the clear zone into two distinct easements: "an avigation or flight easement giving [the plaintiff] a right to fly through the airspace above [the] defendants' properties;" and "a clearance easement providing [the plaintiff] the right to cut down those trees obstructing the approach to runway 11/29 and its clear zones." County of Westchester v. Town of Greenwich, Conn.,

by prescription, concluded nevertheless that the plaintiff had acquired such easements; id., 1205, 1207; and granted the plaintiff "a limited injunction to cut back, at its own expense, the trees occupying runway 11/29's clear zones . . . ." Id., 1223. The court further held that "[t]o the extent certain trees cannot be simply trimmed back without destroying them, the County shall be permitted to remove them completely but must compensate defendants for their loss." Id. The defendants appealed to the United Ststes Court of Appeals for

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793 F. Sup. 1195, 1204 (S.D.N.Y. 1992). The court explained that "[t]he function of a clearance easement . . . is: 'to increase the margin of safety for flying by assuring that the glide zone will be free from natural growth or manmade obstructions and the pilot's vision unobscured above a designated altitude.'" Id., 1203, quoting City of Oakland v. Nutter, 13 Cal. App. 3d 752, 763, 92 Cal. Rptr. 346 (1970).

the Second Circuit. The Court of Appeals subsequently certified the present questions to this court.

Prescriptive easements are recognized in this state. General Statutes § 47-37;[10] Klar Crest Realty, Inc. v. Rajon Realty Corporation, 190 Conn. 163, 459 A.2d 1021 (1983). "To establish an easement by prescription it is absolutely necessary that the use be adverse. It must be such as to give a right of action in favor of the party against whom it has been exercised." Whiting v. Gaylord, 66 Conn. 337, 344, 34 A. 85 (1895). In order to prove such adverse use, the party claiming to have

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10 "[General Statutes] Sec. 47-37. **WHEN ACQUIRED BY ADVERSE USE.** No person may acquire a right-of-way or any other easement from, in, upon or over the land of another, by adverse use or enjoyment thereof, unless the use has been continued uninterrupted for fifteen years."

acquired an easement by prescription must demonstrate that the use of the property has been "open, visible, continuous and uninterrupted for fifteen years and made under a claim of right." Andrzejczyk v. Advo System, Inc., 146 Conn. 428, 431, 151 A.2d 881 (1959); Putnam, Coffin & Burr, Inc. v. Halpern, 154 Conn. 507, 515, 227 A.2d 83 (1967); Klar Crest Realty, Inc. v. Rajon Realty Corporation, supra, 168. There can be no claim of right unless the use is "unaccompanied by any recognition of the right of [the servient tenement] to stop such use. A use by express or implied permission or license cannot ripen into an easement by prescription." (Citations omitted.) Sachs v. Toquet, 121 Conn. 60, 66, 183 A. 22 (1936); Klar Crest Realty, Inc. v. Rajon Realty Corporation, supra. Connecticut law

refrains from extinguishing or impairing property rights by prescription unless the party claiming to have acquired an easement by prescription has met each of these stringent conditions.

Although these principles are firmly rooted in our statutory and common law, the issue of whether an avigation easement may be acquired by prescription is one of first impression in this state. At lease two other courts have held that an avigation easement may not be acquired by prescription. See Hinman v. Pacific Air Transport, 84 F.2d 755 (9th Cir. 1936), cert. denied, 300 U.S. 654, 57 S. Ct. 431, 81 L. Ed. 2d 865 (1936); Sticklen v. Kittle, 168 W.Va. 147, 287 S.E.2d 148 (1981). Although we are not aware of any case in which a prescriptive avigation easement has been upheld, several jurisdictions have

suggested that such an easement may be acquired under appropriate circumstances. See, e.g., Drennan v. County of Ventura, 38 Cal. App.3d 84, 112 Cal. Rptr. 907 (1974); Shipp v. Louisville & Jefferson County Board, 431 S.W.2d 867 (Ky. 1968), cert. denied, 393 U.S. 1088 89 S. Ct. 880, 21 L. Ed. 2d 782 (1969); Peterson v. Port of Seattle, 94 Wash. 2d. 479, 618 P.2d 67 (1980). Because we conclude that the plaintiff did not acquire a prescriptive avigation easement in the circumstances presented, we need not decide whether an avigation easement may ever be acquired by prescription in this state.

As we have stated, an easement may not be acquired by prescription unless the use of the property is "such as to give a right of action in favor of the party against whom [the adverse use] has

been exercised." Whiting v. Gaylord, supra. For the plaintiff to have acquired a prescriptive avigation easement, therefore, the defendants must have had a right of action against the plaintiff during a fifteen year period when the plaintiff's use of the airspace over the defendants' properties was "open, visible, continuous and uninterrupted." The defendants, however, had no right of action against the plaintiff to stop the overflights because federal law prohibits landowners from obtaining injunctive relief against aircraft using the navigable airspace of the United States.[11] United States v.

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[11] 49 U.S.C. § 1304 provides in relevant part: "There is recognized and declared to exist in behalf of any citizen of the United States a public right of freedom of transit through the navigable airspace of the United States." "Navigable airspace" is defined as "[t]he minimum altitudes of

City of New Haven, 367 F. Sup. 1338, 1341 (D. Conn. 1973), aff'd, 496 F.2d 452 (2d Cir.). cert. denied, 419 U.S. 958, 95 S. Ct. 218, 42 L. Ed. 2d 174 (1974); Town of East Haven v. Eastern Airlines, Inc., 331 F. Sup. 16, 32-33 (D. Conn. 1971), aff'd, 470 F.2d 148 (2d Cir. 1972), cert denied, 411 U.S. 965, 93 S. Ct. 2144, 36 L. Ed. 2d 685 (1973). In these circumstances, the defendants could not have reclaimed the exclusive use of the airspace above their properties and, therefore, the use of that airspace by the plaintiff can not be considered adverse.[12]

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flight prescribed by regulations, [including] airspace needed to insure safety in take-off and landing of aircraft." 49 U.S.C. § 1301 (29). See also United States v. Causby, 328 U.S. 256, 266, 66 S. Ct. 1062, 90 L. Ed. 2d 1206 (1946).

[12] This conclusion also follows from application to the facts of this case of the correlative proposition that the use

The plaintiff argued, and the District Court agreed, that the right of the defendants to seek compensation from the plaintiff for aircraft flights "so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land";[13] United States v. Causby, 328 U.S. 256, 266, 66 S. Ct. 1062, 90 L. Ed. 2d 1206 (1946); Griggs v. County of Allegheny, 369 U.S. 84, 88-89, 82 S. Ct. 531, 7 L. Ed. 2d 585 (1962); constituted a right

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of property by permission or license cannot ripen into an easement by prescription. That the use of the airspace is authorized by federal law rather than by the defendants does not alter our conclusion. See, e.g., Pro-Fac Cooperative, Inc. v. Baltimore & Ohio. R. Co., 36 A.D.2d 441, 321 N.Y.S.2d 208 (1971) (Cardamone, J.) (during period of time that use of property is authorized by state statute, such use cannot ripen into prescriptive easement.

[13] The FAA-defined approach path lies at its lowest point within thirty-one feet of the surface of Tomonto's

of action[14] sufficient to satisfy the requirements of our law of prescription. We disagree. The certified record does not include any facts to suggest and the District Court did not find, that the overflights had, in any manner, harmed the defendants' trees or otherwise interfered with the use and enjoyment of the defendants' properties. Nor did the defendants so

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property and seventeen feet above the Greenwich King Street Associates' land. (A504)

[14] In United States v. Causby, 328 U.S. 256, 264-65, 66 S. Ct. 1062, 90 L. Ed. 2d 1206 (1946), the United States Supreme Court held that a private landowner may have a takings claim under the fifth and fourteenth amendments to the United States constitution for damages caused by flights of aircraft over its property. The Court recognized, however, that "[t]he airplane is part of the modern environment of life and the inconveniences which it causes are normally not compensable under the Fifth Amendment. The airspace, apart from the immediate reaches above the land, is part of the public domain;" id., 266;

claim. The defendants cannot have been required to have sought compensatory relief in order to have forestalled the plaintiff's acquisition of a prescriptive agivation easement when the overflights had never interfered with the defendants' use and enjoyment of their properties. Although we doubt that we would ever require a landowner to assert a constitutional takings claim in order to avoid the acquisition of a prescriptive avigation easement, we are satisfied that these defendants were not obliged to do so.[15]

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and flights over private land, therefore, "are not a taking, unless they are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land." Id.

[15] The town of Greenwich also argues that the plaintiff's claim to have acquired a prescriptive avigation easement as to the town fails because an easement may not be acquired over a municipality's right of way. Our resolution of the matter on other

The first certified question is answered: No, not in these circumstances; because the plaintiff has failed t show that its use was adverse as required by Connecticut law.

No costs will be taxed in this court to either party.

In this opinion the other justices concurred.

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grounds makes it unnecessary for us to consider this argument.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 30th day of December one thousand nine hundred and ninety-three.

COUNTY OF WESTCHESTER, NEW YORK,
Plaintiff-Appellee,
COMMISSIONER OF TRANSPORTATION
OF THE STATE OF CONNECTICUT,
Defendant, DOCKET NUMBER:
92-7698(L),
TOWN OF GREENWICH; LAURELTON 92-7700
NURSING HOME, INCORPORATED; 92-7704
GREENWICH KING STREET 92-7706
ASSOCIATES II, L.P.; MILDRED 92-7726
TOMONTO, CONVENT OF THE 93-7018
SACRED HEART,
Defendants-Appellants,
LAUREL CONVALESCENT HOME, INC.,
Appellant.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by Appellee County of Westchester.

Upon consideration by the panel that decided the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has

been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT,
GEORGE LANGE III, Clerk
By:

s/_____
Carolyn Clark Campbell
Chief Deputy Clerk

(2)

Supreme Court, U.S.
FILED
APR 28 1994
OFFICE OF THE CLERK

No. 93-1549

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

COUNTY OF WESTCHESTER, NEW YORK,

Petitioner,

vs.

COMMISSIONER OF TRANSPORTATION OF THE STATE OF CONNECTICUT; TOWN OF GREENWICH; LAURELTON NURSING HOME, INC.; GREENWICH KING STREET ASSOCIATES II, L.P.; MILDRED TOMONTO; CONVENT OF THE SACRED HEART; LAURELTON CONVALESCENT HOME, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT CONVENT OF THE SACRED HEART'S BRIEF IN OPPOSITION

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41 pp

QUESTION PRESENTED

Did the United States Court of Appeals for the Second Circuit violate the grant of diversity jurisdiction to the United States District Courts contained in 28 U.S.C. § 1332 by adopting the Connecticut Supreme Court's holding, in response to certified questions, that based on the certified record on appeal Petitioner County of Westchester was not entitled to summary judgment declaring as a matter of Connecticut law that it had obtained air navigation and obstruction clearance easements by prescription over Respondents' property in the State of Connecticut?

TABLE OF CONTENTS

COUNTERSTATEMENT OF THE CASE 2

A. Factual Background 2

B. Procedural Background . . . 8

REASONS THE PETITION FOR CERTIORARI SHOULD BE DENIED 14

A. Petitioner Has Identified No Reason to Grant Certiorari 14

B. Restatement of the Questions Certified Does Not Vitiate the Connecticut Supreme Court's Response 17

C. As the District Court's Grant of Summary Judgment as a Matter of Law Involved No Findings of Fact, the Connecticut Supreme Court's Contrary Application of Connecticut Law to the Record Did Not Improperly Usurp any Federal Right to Federal Factfinding in Diversity Cases 23

D. The Connecticut Supreme Court's Application of Connecticut Law is Binding under Erie Railroad v. Tompkins 30

CONCLUSION 35

TABLE OF AUTHORITIES

Cases

Aetna Life Ins. Co. of Hartford, Conn. v. Haworth, 300 U.S. 227 (1937) 19

Battlestein Investment Co. v. United States, 442 F.2d 87 (5th Cir. 1971) 29

Boyd v. Bulala, 905 F.2d 764 (4th Cir. 1990) 21

Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938) 31, 32, 34

Fulton National Bank v. Tate, 363 F.2d 562 (5th Cir. 1966) . . . 28

Griggs v. County of Alleghany, Pennsylvania, 369 U.S. 84 (1962) 17

Hinman v. Pacific Air Transport, 84 F.2d 755 (9th Cir. 1936), cert. denied 300 U.S. 654 (1937) 33

Home Ins. Co. v. American Home Prods. Corp., 75 N.Y.2d 196, 551 N.Y.S.2d 481, answer to certified question conformed to, 902 F.2d 1111 (2d Cir. 1990) 21

Insinga v. LaBella, 876 F.2d 883 (11th Cir. 1989) 22

Kennel v. Carson City School Dist., 738 F. Supp. 376 (D. Nev. 1990) 32

Kuhn v. Fairmont Coal Co., 215 U.S. 349 (1910) 31

Martinez v. Rodriquez, 394 F.2d 156 (5th Cir. 1968) 22

Moore v. Illinois C.R. Co., 312 U.S. 630 (1941) 31

Morrell Constr., Inc. v. Home Ins. Co., 899 F.2d 875 (9th Cir. 1990) 22

Norwalk Teachers' Ass'n v. Board of Educ., 138 Conn. 269, 83 A.2d 482 (1951) 19

Puckett v. Rufenacht, Bromagen, & Hertz, Inc., 949 F.2d 789 (5th Cir. 1992) 32

Toner v. Lederle Laboratories, 828 F.2d 510 (9th Cir. 1987), cert. denied, 485 U.S. 942 (1988) . . 22

Tyler v. Insurance Co. of North America, 539 F.2d 1072 (5th Cir. 1976) 27, 28, 29

United States v. Causby, 328 U.S. 256 (1946) 33

United States v. One Tinteretto Painting, 691 F.2d 603 (2d Cir. 1982) 24, 26

Statutes and Codes

28 U.S.C. § 1292(b) 11

28 U.S.C. § 1332 26

49 U.S.C. § 1301 *et seq*. 9

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OCTOBER TERM, 1993

COUNTY OF WESTCHESTER, NEW YORK,

Petitioner,

vs.

COMMISSIONER OF TRANSPORTATION OF THE STATE OF CONNECTICUT; TOWN OF GREENWICH; LAURELTON NURSING HOME, INC.,; GREENWICH KING STREET ASSOCIATES II, L.P.; MILDRED TOMONTO; CONVENT OF THE SACRED HEART; LAURELTON CONVALESCENT HOME, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT CONVENT OF THE SACRED HEART'S BRIEF IN OPPOSITION

COUNTERSTATEMENT OF THE CASE

A. Factual Background

For over one hundred years trees have been growing on the hillside now owned by Respondent Convent for the Sacred Heart (the "Convent") in Greenwich, Connecticut, across King Street from the New York State boundary line. Some of these trees, still present on the Convent's property, were 20 years old by the time the Wright brothers successfully completed the first powered heavier-than-air flight at Kitty Hawk in 1903. More trees were planted on the same hillside by Henry Steers in 1908 when the property was relandscaped during construction of the estate residence now used by the Convent as a school. These trees, too, are still on the site.

These trees on the Convent's property were mature trees by the year

1942, when the United States Civil Aeronautics Administration and Army Corps of Engineers began construction of an airport (the "Airport") across the state boundary in Westchester County, New York. Also in 1942, the Convent acquired its property for use as a boarding school for girls. Although the Civil Aeronautics Administration constructed one runway (now known as "Runway 11/29") pointed directly at the wooded hill, it neither sought nor obtained any easements or rights to cut trees from the Convent. In late 1943, the Airport was turned over to the County of Westchester for use as a municipal airport.

The hill on the Convent's property rises to a height of 442 feet above sea level. This is fifty-four feet higher in altitude than the elevation indicated for the closest end of Runway 11/29 -- so

that the ground level is at the equivalent height of a five-story building located at the end of the runway.

Not surprisingly, the mature trees on the Convent's property have obstructed the approach to Runway 11/29 from the time of the Airport's opening. Although the Federal Aviation Administration ("FAA") requires an airport to maintain a clear "approach surface" rising at a twenty-to-one slope from a point 200 feet beyond the threshold of a runway, a series of official United States government obstruction charts for the Airport show tree obstructions in this approach surface for Runway 11/29 in 1949, 1963, 1970, 1981, and 1990. Nevertheless, the trees, the Convent, and the Airport coexisted for decades, with pilots approaching runway 11/29 from the

east making the steep landing approaches necessary to give the trees an adequate margin. This steeper runway approach also kept the approach path over the Convent's property sufficiently high that, although the noise of the airplanes was an annoyance, the overflights did not interfere with or prevent the Convent from operating its school.

In 1969, the FAA alerted the Airport to potential tree obstruction problems in the approach to Runway 29. Petitioner took no action. During 1979, the Airport sought to install a visual approach slope indicator ("VASI") system for Runway 29 and discovered that the trees already present on the Convent Property prevented the VASI installation because the trees interfered with an approach slope well above the three degree slope upon which the approach surface plane is based.

Although the Convent declined Petitioner's request to trim trees, Petitioner took no further action, and did not assert any preexisting right to clear trees. Commencing in 1981, the FAA sent the Airport a series of increasingly urgent notices to correct the tree obstructions in the Runway 29 clear zone and directed the Airport to take action to remedy the problem. Still, Petitioner took no action. During this time, the Convent undertook costly plans to expand its educational facilities, relying on its right as owner of the property to maintain the landscaped, wooded setting appropriate for an educational institution.

Finally, at the end of 1988, nearly twenty years after the FAA first advised the Airport of its tree obstruction problems on the approach to Runway 29,

the Airport displaced the threshold of Runway 29 in order to bring the runway into compliance with FAA requirements. With the displacement of the threshold, Runway 29 now meets FAA standards and requirements for clearance of the approach zone, and is considered safe. Only after the FAA displaced the threshold did Petitioner commence this lawsuit seeking a declaration that it had the right to trim trees on the Convent's property and a prohibition against any use of the hillside more than two feet above ground level.

Runway 11/29 is the smaller of two runways currently operating at the Airport. The other runway, Runway 16/34 is oriented in a north-south direction, and is 6,550 feet in length. This longer runway, Runway 16/34, is the Airport's primary runway, and is the only runway

that is usable by air transport jet aircraft, even with Runway 11/29 at full length. Runway 11/29 is oriented in an east/west direction, and, prior to 1989, was 4,451 feet in length. Runway 11/29 is used as an alternate "crosswind" runway for some smaller aircraft under certain wind conditions. If the Airport were unable to cut or trim the Landowners' trees, its commercial operations would not be much impaired.

B. Procedural Background

Petitioner commenced this lawsuit in 1990. The Complaint sought an injunction against the Convent and other Connecticut landowners, requiring them to permit the removal of those trees on their properties whose height prevented the Airport from complying with FAA requirements for runway landing approaches. Lacking the authority to

condemn property rights in another State, Petitioner sought the equivalent relief (but without the requirement for compensation) on common law theories of prescriptive easement and nuisance, the federal declaration of navigable airspace in the Civil Aeronautics Act ("CAA"), 49 U.S.C. § 1301 et seq., and interference with a claimed constitutional right of interstate commerce. All parties agree that the Petitioner's common law claims are governed by Connecticut law.

On September 10, 1990, the District Court granted the respondents' motions to dismiss all of the federally based claims and the claims asserted against the Connecticut Commissioner of Transportation, but denied the motions with respect to Petitioner's Connecticut common law claims. County of Westchester v. Town of Greenwich, 745 F. Supp. 951

(S.D.N.Y. 1990). Each of the respondent landowners answered and interposed counterclaims seeking, in the alternative, inverse condemnation damages for loss of valuable property rights in the event that the District Court were to find that the Airport could prevent the landowners from growing trees or making any other use of their property within the airspace claimed by the Airport. The District Court granted Petitioner's motion to dismiss respondent landowners' inverse condemnation counterclaims on February 12, 1991. County of Westchester v. Town of Greenwich, 756 F. Supp. 154 (S.D.N.Y. 1991).

Following completion of discovery, the landowner respondents (except for respondent Laurelton Convalescent Home) moved for summary judgment on the Petitioner's common law prescriptive

easement and nuisance claims. Petitioner cross-moved for summary judgment. On June 2, 1992, the District Court granted the Petitioner's cross-motion for summary judgment in part. The District Court held that Petitioner had established a right to a prescriptive air navigation (or "avigation") and obstruction clearance easements as a matter of Connecticut law. The District Court granted the Airport an "injunction to cut back, at its own expense, the trees occupying Runway 11/29's clear zones to the heights they attained as of February 1975." Respondent landowners moved the District Court to certify the question whether and to what extent Connecticut law recognizes a prescriptive easement for air navigation and obstruction clearance for immediate appeal pursuant to 28 U.S.C. § 1292(b). The District

Court so certified, and the United States Court of Appeals for the Second Circuit then accepted the interlocutory appeal.

In an order dated January 6, 1993, the United States Court of Appeals for the Second Circuit certified the question of whether Connecticut would recognize a prescriptive easement for air navigation and obstruction removal to the Connecticut Supreme Court. The Second Circuit certified three questions:

> 1. Can an avigation easement be acquired by prescription in the State of Connecticut?
>
> 2. If under Connecticut law a clearance easement is distinct from an avigation easement, can a clearance easement be acquired by prescription in the State of Connecticut?
>
> 3. Whether conceived as incident to an avigation easement or as constituting a separate clearance easement, would a clear zone include

whatever air space is necessary to use the easement?

The Connecticut Supreme Court accepted the certified questions, and the Second Circuit transmitted the record to the Connecticut Supreme Court for its review. On July 28, 1993, the Connecticut Supreme Court responded to the first certified question by holding that Connecticut law would not recognize a prescriptive avigation easement in Petitioner's favor under the circumstances revealed by the record in this case. This response to the first certified question obviated any need to answer the second and third certified questions.

Petitioner then moved the Second Circuit to reject the Connecticut Supreme Court's statement of Connecticut law. The Second Circuit denied this motion in

an opinion dated November 10, 1993, in which it adopted the Connecticut Supreme Court's answer to the certified questions, and reversed and remanded the District Court's grant of partial summary judgment to Petitioner. Petitioner moved for rehearing by the Second Circuit. The Second Circuit denied the motion for rehearing. Petitioner's Petition to this Court for Certiorari followed.

REASONS THE PETITION FOR CERTIORARI SHOULD BE DENIED

A. Petitioner Has Identified No Reason to Grant Certiorari.

Contrary to Supreme Court Rule 14(j), Petitioner has pointed to none of the reasons set forth in Supreme Court Rule 10 for grant of a writ of certiorari in this case. Petitioner points to no conflict between the decision of the Second Circuit adopting Connecticut's

response to the questions certified and the decision of any other United States Court of Appeals. Petitioner does not "at this point" argue that the decision of the Connecticut Supreme Court contravenes controlling "federal common law." Petition at 43. Petitioner does not assert that the procedure followed by the Second Circuit Court of Appeals so deviated from normal procedure as to require an exercise of this Court's supervisory powers. Rather, Petitioner relies solely on an imagined threat to the entire national air transportation system due to the shortening of one runway at Petitioner's municipal airport.

The existence of such a grave threat to the national air transportation system evaporates in light of the fact that the Runway 11/29 threshold has now been displaced for five years, without any

apparent harm to the Republic. Petitioner has explicitly acknowledged that it has filed this lawsuit as a substitute for condemnation proceedings, which are unavailable to it as a New York municipality seeking to abrogate Connecticut property rights.[1] This Court long ago noted that Congress made a decision not to condemn the property rights necessary for clear airport approaches by federal fiat or by federal judicial process, but to leave the responsibility for acquiring property

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[1]Petitioner goes so far as to suggest that the District Court "granted the County a prescriptive avigation easement over respondents' lands," Petition at 18, as if the District Court had the authority to condemn and "grant" property rights, without compensation. Of course, all the District Court has the authority to do is to declare the rights of the parties under applicable State law -- and the parties agree that the applicable law is that declared by Connecticut Supreme Court.

rights in the laps of the local airport owner. Griggs v. County of Alleghany, Pennsylvania, 369 U.S. 84, 89-90 (1962). If the threat posed by Respondents' trees in this case were as grave a threat to the national air transport system as Petitioner supposes, then Congress could step in with special legislation to condemn the rights necessary to operate that system. Petitioner offers no reason why this Court should become the Supreme Court of property condemnation in the absence of such Congressional action.

B. Restatement of the Questions Certified Does Not Vitiate the Connecticut Supreme Court's Response.

Certification is a useful procedure in diversity cases where state law principles determine the outcome of a case and the relevant state law principles are not settled.

Certification allows a federal court to obtain an authoritative statement of the governing state law, as applied to the facts of the pending case. At the suggestion of the Attorney General of the State of Connecticut, the Second Circuit adopted the certification route "as prudent counsel" in this case, noting that "there appears to be little law anywhere directly addressing the particular rights at issue here." January 6, 1993 Second Circuit Opinion, Petition Appendix at A-168. Accordingly, in its order dated January 6, 1993, the Second Circuit certified the questions stated above to the Supreme Court of the State of Connecticut, and directed the clerk to transmit a certificate of the questions certified, together with "a complete set of the briefs, appendix, and record filed by the parties in this

court." Petition Appendix A-159 (emphasis added).

Petitioner now protests that because the Connecticut Supreme Court answered the first certified question "under the[] circumstances" of this case rather than in the abstract, its answer may be ignored as no answer at all. This proposition is ludicrous. Courts, both federal and state (including courts in Connecticut) decide cases on the basis of an actual dispute between parties, not on abstract, hypothetical questions of law. See Aetna Life Ins. Co. of Hartford, Conn. v. Haworth, 300 U.S. 227 (1937); Norwalk Teachers' Ass'n v. Board of Educ., 138 Conn. 269, 83 A.2d 482 (1951). There would be no point in certifying the entire record on appeal to the Connecticut Supreme Court if it was not to be permitted to look at the factual

context and record under which this appeal arose; moreover, a request for a response to an abstract question divorced from the record would not present a justiciable controversy that the Supreme Court of Connecticut would be capable of hearing and deciding.

Petitioner cites no authority whatsoever for the proposition that a receiving court's insistence on answering a certified question under the particular circumstances of the record certified vitiates the authority of its decision, and counsel is aware of none.[2] To the contrary, the federal reporters are full of federal decisions conforming to state court responses to certified questions

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[2]Indeed, counsel is aware of no case anywhere in which a federal court, after certifying questions to a state court and receiving an answer, declined to follow the answer of the state court.

where the state court specifically considered the questions in the light of the record of the particular case. See, e.g., Boyd v. Bulala, 905 F.2d 764, 767 (4th Cir. 1990) ("[a]s applied to the facts found in this case"); Home Ins. Co. v. American Home Prods. Corp., 75 N.Y.2d 196, 200, 551 N.Y.S.2d 481, 483 ("answer to the certified question depends on an analysis of New York's public policy and an application of that policy to the circumstances here."), answer to certified question conformed to, 902 F.2d 1111 (2d Cir. 1990).

Petitioner also complains that the Connecticut Supreme Court, by rephrasing the certified question to limit the response to the circumstances actually presented, somehow undercuts the authority of the response. This contention, too, is without any support,

and is contrary to authority. State Court answers to certified questions are routinely followed where the answering court has rephrased the question certified. See Insinga v. LaBella, 876 F.2d 883 (11th Cir. 1989); Toner v. Lederle Laboratories, 828 F.2d 510 (9th Cir. 1987), cert. denied, 485 U.S. 942 (1988). Indeed, federal courts certifying questions to state courts have emphasized that the answering court retains discretion to rephrase the question certified based on its review of the record before it. See Morrell Constr., Inc. v. Home Ins. Co., 899 F.2d 875, 878 (9th Cir. 1990); Martinez v. Rodriquez, 394 F.2d 156, 159 n.6 (5th Cir. 1968).

Far from presenting any cert-worthy question of conflicting procedure, the procedure followed by the Second Circuit

and the Connecticut Supreme Court, including the transmission of the entire record and review of the issues of Connecticut law based upon the concrete record in this case, is in line with every reported decision dealing with certification of questions of State law of which counsel is aware.

C. As the District Court's Grant of Summary Judgment as a Matter of Law Involved No Findings of Fact, the Connecticut Supreme Court's Contrary Application of Connecticut Law to the Record Did Not Improperly Usurp any Federal Right to Federal Factfinding in Diversity Cases.

Petitioner's main beef with the procedure followed is Petitioner's claim that the Connecticut Supreme Court somehow "usurped the authority of the federal district court to make findings of fact, and made several which in effect 'reversed' the findings of the district court." Petition at 35. This assertion

misrepresents the procedural posture of this case both before the District Court and before this Court: there has been no trial, and thus no determination of any disputed "question of fact" by any court or jury.[3] The District Court judgment appealed from, and the record certified to the Connecticut Supreme Court, was on cross-motions for summary judgment. See United States v. One Tinteretto Painting, 691 F.2d 603 (2d Cir. 1982) (role of court on summary judgment motion is issue finding, not fact finding).

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[3]Nowhere in its Statement of the Case does the Petition even inform this Court that the District Court decision appealed from was a decision to grant partial summary judgment to Petitioner. Instead, Petitioner seeks to create the misimpression that the District Court held a trial and made a "scrupulous examination of the facts and the law" before "grant[ing] the County an easement." Petition at 18.

The Connecticut Supreme Court's decision was made based on its own careful search of the record for any facts that would establish (as was Petitioner's burden) that the use of airspace above respondents' properties sufficiently interfered with the defendants' use and enjoyment of their properties to constitute an actionable adverse use. See Connecticut Supreme Court Opinion, Petition Appendix at A-178 - A-180. Contrary to Petitioner's contention, the Connecticut Supreme Court's resolution of this issue was its application of the "adversity" element of prescription under Connecticut law, not judicial factfinding. The District Court's opposite legal conclusion, that a use could be adverse simply because it might sometime in the future interfere with the landowners' continued use, was

properly rejected by the Connecticut Supreme Court as an incorrect statement of Connecticut law.

The Connecticut Supreme Court could not possibly have reversed "findings" of fact by the District Court: on a summary judgment motion the District Court should not have been making any findings of disputed issues of fact. See One Tintoretto Painting, supra. Moreover, to the extent that the Congressional grant of diversity jurisdiction in 28 U.S.C. § 1332 implies a federal "right" to federal court oversight of "factfinding" (or, more properly, issue determination) in diversity cases, this interest was in fact preserved in this case by the Second Circuit's own retention of jurisdiction over the appeal and review of Petitioner's claims on its motion to reject the answer to the certified

questions. Prior to applying the Connecticut Supreme Court's statement of applicable law, the Second Circuit satisfied itself that the Connecticut Supreme Court "applied Connecticut's adverse use requirement to the record supplied by the district court." Petition Appendix A-21. Thus, the Second Circuit's review assured that the Connecticut Supreme Court had stuck to the summary judgment record before it, and preserved any interest Petitioner might have in ensuring federal court impartiality in matters of issue determination on a summary judgment motion.

The Second Circuit's procedure in this case conformed to reported decisions in other circuits. For instance, in Tyler v. Insurance Co. of North America, 539 F.2d 1072 (5th Cir. 1976), the Fifth

Circuit rejected a gambit very similar to Petitioner's challenge to the Connecticut Supreme Court decision. In Tyler, the Fifth Circuit certified a state law question of insurance contract interpretation to the Alabama Supreme Court. When the state court reached a conclusion of law adverse to it, the appellee insurer sought to avoid the answer to the certified question on the grounds that the district court (in ruling on cross motions for summary judgment) had made factual determinations that precluded application of the rule of law enunciated by the state court. The Fifth Circuit rejected this line of attack:

> We reject this argument. Whatever the technical disposition by the District Judge, our disposition on appeal following consideration by the Alabama Supreme Court is the same. Any fact findings

> based on an erroneous legal standard cannot be credited. Battlestein Investment Co. v. United States, 5 cir., 1971, 442 F.2d 87, 89; Fulton National Bank v. Tate, 5 Cir., 1966, 363 F.2d 562, 566.

539 F.2d at 1074. Likewise, whatever "findings" the District Court might have purported to make about the adversity of Petitioner's aircraft overflights cannot stand given the Connecticut Supreme Court's conclusion that Connecticut law does not support the finding of an easement by prescription on this record.

Petitioner points to no contrary authority; nor does Petitioner offer any reason why a fact-bound inquiry into whether the Connecticut Supreme Court properly stuck to the record on cross-motions for summary judgment is worthy of this Court's attention.

D. The Connecticut Supreme Court's Application of Connecticut Law is Binding under Erie Railroad v. Tompkins.

Petitioner tries to argue that the Connecticut Supreme Court is incorrect in its application of Connecticut law, citing Connecticut decisions for its view of the "correct" statement of the Connecticut common law of prescriptive easements. Petition at 32-33. However, the "correct" principles of the Connecticut common law of prescriptive easements as applied to the unique circumstances of flights through the navigable airspace of the United States are not a matter for this Court to decide, having been settled by the Connecticut Supreme Court's decision of the certified questions on this appeal.

Federal courts sitting in diversity jurisdiction are bound to follow the

Connecticut Supreme Court's decision on this appeal as the most authoritative statement of applicable Connecticut law available, under the principle of Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938). Erie, of course, made clear that federal courts are not free to ignore authoritative statements of applicable state law in diversity cases; to do so is "an unconstitutional assumption of powers by the Courts of the United States." Id. at 79 (quoting Kuhn v. Fairmont Coal Co., 215 U.S. 349, 370-72 (1910)).

A federal court is bound by a ruling of a State's highest court even though this decision might not be binding on the State court itself in a second appeal. Moore v. Illinois C.R. Co., 312 U.S. 630 (1941). Even if the decision of the Connecticut Supreme Court were merely considered dicta, it could not be ignored

by a federal diversity court as petitioner suggests. Kennel v. Carson City School Dist., 738 F. Supp. 376 (D. Nev. 1990). Thus, whether, the decision of the Connecticut Supreme Court is applied as law of the case, or simply as the most authoritative statement of the application of Connecticut law to the record of this case, Erie requires the result reached by the Second Circuit in this case. See Puckett v. Rufenacht, Bromagen, & Hertz, Inc., 949 F.2d 789, 790 (5th Cir. 1992).

Petitioner has specifically declined to ask this Court to adopt a federal common law of prescriptive avigation easements, Petition at 43, and appropriately so, as the determination of rights in real property within a State's borders is a quintessential matter of State sovereignty. Nevertheless,

Petitioner neglects to mention that even if federal common law were applied, the earliest case addressing the possibility of prescriptive rights to air navigation easements was a decision of the United States Court of Appeals for the Ninth Circuit, Hinman v. Pacific Air Transport, 84 F.2d 755 (9th Cir. 1936), cert. denied 300 U.S. 654 (1937). Hinman squarely rejected the proposition that aircraft traveling through the navigable airspace of the United States under the federal declaration in the Civil Aeronautics Act could obtain prescriptive rights. The Hinman decision was cited with approval by this Court in its own seminal case deciding that landowners whose property is effectively taken by frequent low-altitude overflights can recover damages for inverse condemnation. United States v. Causby, 328 U.S. 256, 264 (1946).

The Connecticut Supreme Court's determination of Connecticut law governing prescriptive rights to air navigation easements is not only the last word on the subject under Erie Railroad, but is consistent with the only holding on the subject under federal common law as well. Petitioner has not asked this Court to reconsider the Erie Railroad decision; nor has it explained how this Court can otherwise revisit a question of Connecticut law upon which the Connecticut Supreme Court has spoken. There is no reason for this Court to grant certiorari.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully Submitted,

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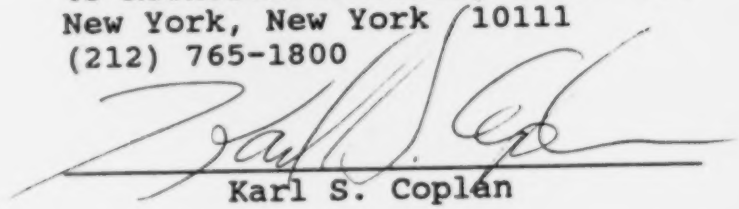

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April 27, 1994

(3) 93-1549

No. _____

Supreme Court, U.S.
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In The
Supreme Court Of The United States
October Term, 1993

COUNTY OF WESTCHESTER,
Petitioner

v.

COMMISSIONER OF TRANSPORTATION OF THE STATE OF CONNECTICUT; TOWN OF GREENWICH; LAURELTON NURSING HOME, INC.; GREENWICH KING STREET ASSOCIATES II, L.P.; MILDRED TOMONTO; CONVENT OF THE SACRED HEART; LAURELTON CONVALESCENT HOME, INC.,
Respondents

BRIEF OF THE STATE OF CONNECTICUT AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

Table Of Authorities ii

Interest Of Amicus 2

Statement Of The Case 3

Summary Of The Argument 5

Argument 6

A. The Court Of Appeals Properly Applied The Law Of The State Of Connecticut As Determined By The Highest Court Of That State. 6

B. The Petitioner Has Misstated The Substantive Law Of Connecticut 8

Conclusion 11

TABLE OF AUTHORITIES

Cases: **Page**

Avis Rent A Car System, Inc. v. Liberty Mutual Ins. Co., 203 Conn. 667, 526 A.2d 522 (1987) 7

Cartenovitz v. Conti, 92 Conn. 546, 103 A.2d 629 (1918) 9

County of Westchester v. Town of Greenwich, 793 F. Supp. 1195 (S.D.N.Y. 1992) 3

King v. Order of United Commercial Travelers, 333 U.S. 153 (1948) 6

Lawton v. Herrick, 83 Conn. 417, 76 A.2d 986 (1919) 9

Migra v. Warren City School District Board of Education, 465 U. S. 75 (1984) 8

Norwalk Heating & Lighting Co. v. Vernam, 75 Conn. 662, 55 A. 168 (1903) 9

Reconstruction Finance Corporation v. Beaver County, Pa., 328 U.S. 204 (1946) 6

Westchester v. Greenwich, 227 Conn. 495, 629 A.2d 1084 (1993) 4

Statutes:

28 U.S.C. §1738 8

28 U.S.C. §1652 ..... 2, 6

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

COUNTY OF WESTCHESTER
Petitioner

v.

COMMISSIONER OF TRANSPORTATION OF THE STATE OF CONNECTICUT; TOWN OF GREENWICH; LAURELTON NURSING HOME, INC.; GREENWICH KING STREET ASSOCIATES II, L.P.; MILDRED TOMONTO; CONVENT OF THE SACRED HEART; LAURELTON CONVALESCENT HOME, INC.,
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INTEREST OF AMICUS

Amicus, pursuant to Supreme Court Rule 36, writes to emphasize its concern for the proper interpretation and application of the substantive law of the State of Connecticut. It is well-established that the highest court of a State has the final word on the meaning of State law and that a Federal Court in a diversity case must follow the substantive law directed by the highest court of the State whose law is found to be applicable. This legal tenet is simply a reflection of the fundamental principles of federalism and comity that are the underpinning of our Nation's constitutional form of government. It is a legal tenet that is memorialized, *inter alia*, in the Rules of Decision Act, 28 U.S.C. §1652, and which was properly followed by the United States Court of Appeals for the Second Circuit in the instant matter.

STATEMENT OF THE CASE

This case turns on the construction of Connecticut's common law of easements by prescription. It came to the federal courts under their diversity jurisdiction.

The District Court, while conceding that the common law of easements by prescription was purely an issue of substantive Connecticut law and that the Connecticut Supreme Court had not as yet addressed the question of avigation easements, nevertheless found that the Connecticut Supreme Court, if called upon to decide the issue under the facts of this case, would recognize the petitioner's claim to an avigation easement by prescription. *County of Westchester v. Town of Greenwich*, 793 F. Supp. 1195, 1205 (S.D.N.Y. 1992). The District Court was wrong.

On appeal, the Court of Appeals for the Second Circuit certified the Connecticut real property law issue to the Supreme Court of Connecticut, pursuant to Conn. Gen. Stat. § 51-199a (Uniform Certification of Questions of Law Act). The Connecticut Supreme Court accepted the certification.

Based upon the facts presented by the Court of Appeals, as found by the District Court, the Connecticut Supreme Court held that since the owners of the land were precluded from instituting an action to bar any trespass by overflying aircraft, a critical element of the Connecticut common law of easement by prescription,

the Court could not agree with the District Court's conclusion that the petitioner had a claim to an avigation easement by prescription. *Westchester v. Greenwich*, 227 Conn. 495, 502, 629 A.2d 1084 (1993).

The Court of Appeals agreed with the Connecticut Supreme Court, reversed the judgment of the District Court on the issue of Connecticut state law and remanded the case to the District Court for further proceedings.

Dissatisfied, Westchester has now petitioned this Court for a determination of the Connecticut law of easements by prescription.

SUMMARY OF THE ARGUMENT

The Court should deny the petition for a writ of certiorari for the following reasons: (a) this case turns upon the construction of a limited issue of Connecticut's substantive law of real property and a determination by this Court of that issue will have no significant impact upon the established relationship of the State and the Federal Court systems in diversity cases; and (b) Westchester's petition to this Court contains a material misstatement of the substantive law of Connecticut.

ARGUMENT

A. THE COURT OF APPEALS PROPERLY APPLIED THE LAW OF THE STATE OF CONNECTICUT AS DETERMINED BY THE HIGHEST COURT OF THAT STATE.

The concepts of real property law are deeply rooted in the traditions, customs, habits and laws of the several States. *Reconstruction Finance Corporation v. Beaver County, Pa.*, 328 U.S. 204, 210 (1946).

The Rules of Decision Act [28 U.S.C. §1652] commands that except where Federal law expressly preempts the field, the Federal Courts are to regard the laws of the States as the rules of decision in all civil actions. *King v. Order of United Commercial Travelers*, 333 U.S. 153, 157 (1948). The laws of the states, as the term is used under this statute, is not limited to the state statutes, but includes the case precedents of the state as well. *Id.*, 157. In a diversity case, the substantive law of the state, as announced by the highest Court of that State, is binding upon the Federal Courts. *Id.*, 157-158.

The object of the statute is to provide for uniformity of decision, discourage forum shopping, and maintain comity between the State and the Federal court systems. *Id.*, 157-158. The outcome of the judicial determination of the substantive law of the state should not be determined by the chance of diverse citizenship nor should the parties be encouraged to shop between one court house and the other in search of the most

favorable reading of the substantive law of the state. *Id.*, 157-158.

In this case, the District Court decided the diversity case before it on the basis of what that Court thought the Connecticut Supreme Court would hold to be the substantive law of Connecticut, if presented with the question. On appeal, the Court of Appeals certified the question to the Connecticut Supreme Court. The Connecticut Supreme Court entertained the briefs and oral arguments of all of the parties. Thereafter, the Supreme Court responded to the certification by stating that under the facts found by the District Court, no easement by prescription could be created under Connecticut law. The petitioner has no right, as it would have it, to an expansive explication of Connecticut law so it may then argue it in Federal Court. Having provided the Federal Court with a determination of the substantive law of Connecticut sufficient to decide this case, the Connecticut Supreme Court in its discretion declined to elaborate further upon portions of the certification unnecessary to the resolution of the controversy. *Avis Rent A Car System, Inc. v. Liberty Mutual Ins. Co.*, 203 Conn. 667, 668 n.1, 526 A.2d 522 (1987). Nor did the Connecticut Supreme Court find facts, as the petitioner contends. Rather, accepting facts found by the District Court, the Supreme Court determined as a matter of Connecticut law that the petitioner had no prescriptive easement. That the petitioner is dissatisfied with the substance of the Supreme Court's opinion

does not make this case worthy of this Court's consideration.

The petitioner essentially asked the Court of Appeals to review the determinations of the Connecticut Supreme Court on the Connecticut substantive law issues determined by that court. The Court of Appeals' refusal to entertain a collateral attack upon the judgment of the Connecticut Supreme Court was consistent with the jurisdictional commands found within 28 U.S.C. §1738. *Migra v. Warren City School District Board of Education*, 465 U. S. 75, 81 (1984). (Federal Court may not entertain a collateral attack upon a final judgment of a State Court of competent jurisdiction in the absence of an affirmative showing of a lack of due process).

Both courts fully and fairly fulfilled their responsibilities under the Rules Decision Act. The comity between the two court systems and the need for uniformity of decision commanded in *King* have been satisfied in this case. There is no need or justification for review by this Court.

B. THE PETITIONER HAS MISSTATED THE SUBSTANTIVE LAW OF CONNECTICUT

The petitioner represents that but for the fact that it is an out of state party, the Connecticut Supreme Court would have recognized avigation and clearance

easements by prescription. (Petition at 40). The petitioner is mistaken.

Easements acquired by prescription must be fixed, ascertainable in location, scope and volume and fully apparent to the owner of the serviant estate. *Cartenovitz v. Conti*, 92 Conn. 546, 550, 103 A.2d 629 (1918) (the owner of the dominate estate acquired an easement by prescription over the serviant estate of his neighbor by extending the fire escape attached to an upper floor of his building over the servant tenant's land.) *Norwalk Heating & Lighting Co. v. Vernam*, 75 Conn. 662, 663-664, 55 A. 168 (1903) (the owner of the dominative estate acquired an easement by prescription by building an addition onto an upper floor of his building which extended over, but did not touch, the surface of the abutting property owner's land).

An easement by prescription may not be obtained under Connecticut law where the intended use is designed to injure the serviant estate in an unnatural or unreasonable manner. *Lawton v. Herrick*, 83 Conn. 417, 424, 76 A.2d 986 (1919). In *Lawton* the claimant to the easement used it to foul the pond on the serviant estate, thereby damaging the serviant tenant's mill operations. The Connecticut Supreme Court refused to recognize the easement. *Id.*, 424.

In this case, the boundaries, volume and limits of avigation and clearance easements claimed by Westchester were not readily apparent to a property owner standing on the ground. Likewise, lopping off

the tops of the trees on the Greenwich King Street tree farm would be ruinous to that respondent's business. Lowering the flight patterns of commercial aircraft would impair the resale value of Mildred Tomonto's home and impair the convalescent home's use of its land.

Thus, even if Federal law had allowed the property owners to enjoin trespassing overflights, the long standing precedents of the Connecticut Supreme Court would have prevented any Court applying the substantive law of Connecticut to recognize Westchester's purported easements by prescription.

In short, under principles of Connecticut State law established long before the petitioner instituted its lawsuit in the Federal District Court, the petitioner could not acquire an avigation easement by prescription.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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